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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 10(a) and (b) of the 1992 Cable Act establish a comprehensive scheme for censorship of "indecent programming" on leased access channels. Congress authorized cable operators to prohibit programming that they "reasonably believe" to be indecent and, in the alternative, required such protected speech to be placed on segregated channels that must be blocked until the subscriber requests access in writing and for up to thirty days thereafter. Section 10(c) authorized cable operators to prohibit programming on public, educational, and governmental access channels that is "sexually explicit" or "solicits or promotes unlawful conduct."

1. Is section 10 unconstitutionally vague under the heightened scrutiny required in First Amendment cases, where it (A) defines "indecent programming" based upon its "patently offensive manner as measured by contemporary community standards," (B) authorizes cable operators to ban leased access programming that they "reasonably believe" to be indecent, and (C) will produce self-censorship by access programmers by requiring them — on pain of fines or cut-off of access — to guess what the FCC may decide is, and what a cable operator may "reasonably believe" to be, "indecent," and to certify that their programs do not violate these standards?

2. Is section 10's explicitly content- and speaker-based censorship scheme immune from First Amendment scrutiny as not "state action" because it delegates censorship decisions in part to cable operators, where (A) petitioners challenge a congressional statute, not a cable operator's specific censorship decisions, (B) Congress and the FCC have defined the category of disfavored speech that they wish cable operators to censor, and (C) Congress has created a joint enterprise with cable operators to effect its censorship scheme, in which the FCC is integrally involved?

3. Can section 10(b) be upheld as the least restrictive means of achieving a "compelling" interest in shielding minors from "indecent" speech, where (A) the interest underlying section 10 is already well-advanced by existing, less-restrictive regulation and additional less restrictive means exist and (B) cable operators are free to continue showing on commercial channels the same programs they must now block on leased access channels, thereby demonstrating that section 10 is unjustifiably underinclusive?

LIST OF PARTIES

The judgment here sought to be reviewed was rendered in a proceeding in which four petitions for review of orders of the Federal Communications Commission were consolidated: actions nos. 93-1169, 93-1171, 93-1270, and 93-1276. Petitioner Denver Area Educational Telecommunications Consortium, Inc. was a petitioner in action no. 93-1171, and petitioner American Civil Liberties Union was a petitioner in actions nos. 93-1171 and 93-1276.*

In addition to those listed on the cover, respondents include Alliance for Community Media, Alliance for Communication Democracy, and People for the American Way, which were petitioners in actions nos. 93-1169 and 93-1270, and New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, David Channon, and National Cable Television Association, Inc., which were intervenors in all four actions.

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* Petitioners have no parent companies or subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES
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DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully petition this Court to issue a writ of certiorari to review the June 6, 1995 judgment of the United States Court of Appeals for the District of Columbia Circuit sitting in banc, sustaining section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j), and 558), and the Federal Communication Commission's implementing regulations.

OPINIONS BELOW

The in banc opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet published and is reprinted in the appendix below ("Pet. App.") at 2a.[1] The in banc *per curiam* order vacating the panel decision is reported at

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[1] "_a" refers to the Appendix to this Petition below.

15 F.3d 186 and reprinted below at 89a. The panel decision is reported at 10 F.3d 812 and reprinted below at 90a.

JURISDICTION

The court of appeals issued its decision on June 6, 1995. The court then granted a motion to stay the issuance of the mandate, which stay is effective until August 9, 1995 and thereafter if a petition for writ of certiorari is filed by that date. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the Constitution to the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j), and 558) ("section 10") is reproduced below at 126a.

The implementing regulations of the Federal Communications Commission ("FCC") are the First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, FCC 93-72, 8 FCC Rcd 998 (1993) (summary of report and reprint of order at 58 Fed. Reg. 7990 (1993)) (codified at 47 C.F.R. § 76.701) ("First Report and Order"), which is reproduced below at 128a, and the Second Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, FCC 93-164, 8 FCC Rcd 2638 (1993) (summary of report and reprint of order at 58 Fed. Reg. 19,623 (1993)) (codified at 47 C.F.R. § 76.702) ("Second Report and Order"), which is reproduced below at 178a.

STATEMENT OF THE CASE

1. Seeking, in part, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521, Congress passed the Cable Communication Policy Act of 1984, which required cable operators to set aside channels for leased access programming that the operators were forbidden to censor, *id.* § 532(b), (c)(2), and prohibited them from censoring programming on the public, educational, and governmental ("PEG") access channels that are required under most cable franchises, *id.* § 531(e). Because cable operators were barred from exercising editorial control over these access channels, which the FCC has held to be a "public forum,"[2] Congress shielded cable operators from liability for access programming. *Id.* § 558. In another provision of the Act, Congress required cable operators to provide "lockboxes" that enable a subscriber to block any cable channel during selected periods, *id.* § 544(d)(2); this provision remains in effect.

In 1992, Congress again focused on the cable industry — this time primarily to re-regulate rates, address customer service practices, and implement "must-carry" broadcast rules — and enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. On the last legislative day before the Senate approved its bill, Senator Helms offered two floor amendments and then-Senator Fowler offered a third that collectively became section 10, which is entitled "Children's Protection from Indecent Programming on Leased Access Channels." Senator Helms plainly stated the purpose of section 10's liability provision: to "put an end to the kind of things going on" on access channels. 138 CONG. REC. S652 (daily ed. Jan. 30, 1992). No other provision in either of the lengthy Senate or House bills even remotely treated the subject matter of, or resembled, section 10, which was never sent

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[2] 87 F.C.C.2d 40, 42 (1981).

to a committee and was never the subject of any congressional findings.

Section 10 established a censorship scheme with four interlocking parts. Section 10(a) authorized cable operators to ban from leased access channels what they "reasonably believe[ ] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards"; cable operators were given, and have, no other authority to regulate the content of congressionally mandated leased access programming. Pet. App. 126a.

Section 10(b), the stated purpose of which is "to limit the access of children to indecent programming," required the FCC to prescribe rules requiring cable operators that have not "voluntarily prohibited" programming under section 10(a) to segregate all "indecent" leased access programming on blocked channels that must remain blocked until a subscriber requests access in writing; Congress mandated no time period within which such requests must be satisfied. Pet. App. 126a-27a. Section 10(b) also required the FCC to prescribe rules requiring leased access programmers to inform cable operators whether any of their programming is "indecent." Thus, if programmers do not so certify, they are in effect promising that all of their works are "decent."

Section 10(c) applies to PEG access channels and authorized cable operators to ban "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Pet. App. 127a.

Finally, section 10(d) pressures cable operators to censor "indecency" by eliminating their statutory immunity from liability for programming on access channels that "involves obscene material." Pet. App. 127a.

2. On November 10, 1992, the FCC issued a notice of proposed rulemaking to implement section 10 and requested comments. Petitioners Denver Area Educational Telecommunications Consortium, Inc. ("DAETC"), which is a nonprofit cable

programmer operating a leased access cable service, and American Civil Liberties Union ("ACLU"), whose members include leased and PEG access viewers, (also collectively "Petitioners") submitted comments to the FCC expressing their concerns about the constitutionality of section 10 and its impact on cable system carriage of a wide variety of access programming, much of which has serious journalistic or artistic value.

Petitioners' concerns stem, in large part, from section 10's capacious definition of "indecent programming" as "describ[ing] or depict[ing] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pet. App. 126a. Because this definition has no substantive content except to subject any programming containing any mention of human reproduction or sexuality, regardless of its value, to a retrospective assessment of "community standards" of "offensiveness," it encompasses a far wider range of programming — but how much more is uncertain — than Senator Helms evidently envisioned from the examples he gave on the Senate floor.[3]

For instance, DAETC's cable access service, known as "The 90's Channel," offers in a verité style a wide variety of material, often controversial and otherwise unavailable, on topics including the Persian Gulf war, environmental contamination, AIDS, racism, US-Cuba relations, art censorship, union organizing, the status of recent immigrants, gay rights, the Palestinian uprising, issues of concern to Native Americans, prostitution, and prison conditions. *See* Comments of DAETC on Notice of Proposed Rule Making, Joint Appendix to the Panel of the Court of

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[3] Senator Helms referenced programming on leased access that purportedly featured people performing oral sex and included ads that "promote incest, beastiality [sic], [and] even rape." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992).

Appeals at 207-08. An important part of DAETC's programming on many of these topics inextricably deals with sexuality, such as the program segments about an organization that seeks to demystify gynecology and teach women how to perform their own pelvic exams, the controversy surrounding a Robert Mapplethorpe art exhibit, a pro-choice performance artist, and an annual Japanese fertility festival — all of which might well fall within section 10's broad regulatory definition of "indecency." *Id.* at 219; *see* Pet. App. 44a-45a (Wald, J., dissenting).

3. On February 3, 1993, the FCC released its First Report and Order, which adopted regulations to implement sections 10(a) and (b) relating to leased access channels. Despite Petitioners' and other comments, the FCC defined "indecent" programming almost identically to the language used in section 10(a), authorized a cable operator to adopt and enforce a policy of banning leased access programming that it "reasonably believes" describes or depicts indecency, and, if a cable operator does not voluntarily adopt and enforce such a policy, required it to block all leased access programming that falls within the FCC's definition of "indecent programming." Pet. App. 171a-72a. The regulations further provide that a cable operator may delay for up to thirty days satisfying a subscriber's request to receive the blocked programming and that the subscriber's request must be made in writing. Pet. App. 171a.

The First Report and Order also required leased access programmers to identify whether any of their programming is indecent and to certify at the operator's request whether their programming is indecent or obscene. If a programmer fails to provide this identification or certification in a timely fashion or if a cable operator believes a programmer has certified incorrectly, the cable operator is not required to provide any access at all to that programmer. Pet. App. 171a-72a. Disputes brought by a cable operator over programming that it "reasonably believes" to be indecent but which the programmer did not identify as "indecent" are to be resolved by the FCC; consumer complaints about "indecency" — but not about censorship — on

leased access channels shall also be resolved by the agency. Pet. App. 166a-68a.

On April 2, 1993, the FCC released its Second Report and Order, which adopted regulations to implement section 10(c) relating to PEG access channels. In the Second Report and Order, the FCC interpreted section 10(c) to authorize cable operators to prohibit obscene material, indecent material (defined as in the First Report and Order, rather than as section 10(c)'s "sexually explicit material"), and material soliciting or promoting unlawful conduct (interpreted by the FCC as "material that is otherwise proscribed by law"). Pet. App. 197a-98a. To further facilitate censorship of access programming by cable operators, the FCC added a provision that allows a cable operator to require a PEG access programmer "to certify that its programming does not contain any of the materials" subject to prohibition under section 10(c). Pet. App. 198a.

4. Petitioners directly petitioned the Court of Appeals for the District of Columbia Circuit for review of the First Report and Order pursuant to 28 U.S.C. § 2342(1), and petitioner ACLU petitioned the court of appeals for review of the Second Report and Order. These petitions were consolidated with two others also seeking review of these FCC regulations and challenging the constitutionality of section 10. The FCC and the United States (collectively the "government") were the respondents in all four actions.

On November 23, 1993 — after oral argument during which the government conceded that, if sections 10(a) and (c) involved "state action," they would be constitutionally invalid under the First Amendment, Pet. App. 104a n.9 — a panel of the court of appeals unanimously held that sections 10(a) and (c) violate the Freedom of Speech Clause of the First Amendment. The panel found that sections 10(a) and (c) amply involve governmental action for purposes of the First and Fifth Amendments because of their content-based regulatory objective, their significant encouragement of private censorship, and their inevitable censorship effect. Pet. App. 104a-08a. The panel then held the

FCC's content-based regulations unconstitutional because they are not the least restrictive means of furthering an asserted compelling interest. Pet. App. 109a-11a. As to section 10(b) and the FCC's regulations, the panel found that they posed such serious constitutional questions due to their apparent underinclusiveness that on remand the FCC ought to reconsider them in light of the panel's opinion. Pet. App. 112a-25a.

The full court vacated the panel's judgment, reheard the case in banc, and on June 6, 1995 sustained section 10 and the FCC's regulations over the dissent in whole or in part of four of the full court's eleven judges. Pet. App. 4a-5a.[4]

Writing for the majority, Judge Randolph concluded — in an unprecedented holding — that portions of a content-based statute regulating speech and the agency's implementing regulations are not subject to First Amendment scrutiny because they only authorize, rather than command, private parties to ban a governmentally defined category of protected speech and do not significantly encourage cable operators to do so. Pet. App. 11a-27a. As to section 10(b), which compels blocking in the absence of banning on leased access channels, the majority found — despite the absence of any legislative record — that it was the least restrictive means to serve the government's "compelling" interest in shielding minors from "indecent" speech. Pet. App. 32a-36a. Additionally, the majority found that section 10(b) does not impermissibly discriminate against leased access speakers and listeners (even though it leaves cable operators free to show on other channels programming that they must block on leased access channels), does not entail a prior restraint due to the thirty day waiting period for unblocking (even though viewers will, as a practical matter, be denied access to programs of protected speech that they request), and is not impermissibly vague. Pet. App. 36a-43a.

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[4] Former-Chief Judge Mikva sat on the original panel, but retired before the rehearing in banc.

In her dissenting opinion joined in full by Judge Tatel, Judge Wald pointed out that sections 10(a) and (b) must be considered together as part of one scheme regulating leased access programming, which, rather than "restore" editorial control to cable operators, requires them either to ban or block "indecent programming," and as such are clearly subject to First Amendment scrutiny. Pet. App. 46a-53a. Moreover, Judge Wald explained that, contrary to the majority's view, this is not a case about whether cable operators should be regarded as state actors when they censor indecent speech under section 10; rather, this case challenges the statute and implementing regulations themselves. Pet. App. 50a & n.4 (noting that the majority's finding that cable operators' acts of censorship under section 10 are not reviewable as state action does not thereby make section 10 itself immune from constitutional scrutiny).

Judge Wald, now also joined by Judge Rogers, then concluded that sections 10(a) and (b) unconstitutionally cause a deprivation of First Amendment rights because of their undue burden on both speakers and listeners, Pet. App. 54a-58a, and are not the least restrictive means of achieving the asserted compelling interest because of the ready availability of less restrictive means, such as the existing lockbox requirement, Pet. App. 66a-71a. Additionally, Judge Wald found that section 10(c), with its governmentally imposed definitions of "indecency" and "material soliciting or promoting unlawful conduct," clearly constitutes governmental action and is not the least restrictive means of achieving the asserted compelling interest. Pet. App. 71a-75a.

Chief Judge Edwards dissented in part and found that sections 10(a) and (b), which must be read together, involve government action (while section 10(c) does not) and that they work in tandem to produce an impermissible ban on protected speech. Pet. App. 77a-81a. Chief Judge Edwards also questioned whether the government's asserted interest of shielding minors from "indecency" was compelling. Pet. App. 82a-84a.

Judge Rogers, concurring in part and dissenting in part, agreed with Judges Wald and Tatel that section 10(b) is unconstitutional,

but argued that it is severable from sections 10(a) and (c), which she, like the majority, perceived as merely "restoring" editorial control to cable operators, even though access channels are governmental creations over which cable operators never had any such control. Pet. App. 85a-88a.

REASONS FOR GRANTING THE WRIT

The petition should be granted because of the importance of the issues raised in this case and because of the court of appeals' unprecedented treatment of these issues. This case challenges the constitutionality of an integrated censorship scheme aimed at a content-based and speaker-based category of protected speech, devised by Congress, implemented by the FCC, and carried out in part with the assistance of private parties.

Despite the egregiousness of this censorship scheme, the majority brushed aside consideration of the scheme's vagueness and lack of essential procedural safeguards, inexplicably found federal statutory provisions that target speech on the basis of content not subject to constitutional scrutiny, and held that segregation and automatic blocking of the censored speech is the least restrictive means of achieving a compelling government interest without any supporting congressional findings whatsoever and in spite of extensive congressional findings that this governmental interest is already well-advanced by existing less-restrictive federal regulation.

In reaching these conclusions in its bid to sustain section 10's censorship scheme, the majority's decision conflicts with applicable decisions of this Court concerning vagueness of statutes regulating speech, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the due process requirements of statutes banning speech, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965), the constitutional scrutiny of state action, *e.g.*, *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and the strict requirements of content- and speaker-based statutes

seeking to ban speech, *e.g.*, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

The decision below also conflicts with decisions of other courts of appeals concerning the heightened vagueness scrutiny afforded statutes regulating speech and directly conflicts with *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994), which is a well-reasoned district court decision finding section 10's censorship scheme unconstitutional.[5]

Finally, with the large and growing number of cable systems across the nation, this case has added significance because of the real risk that self-censorship by programmers and censorship by cable operators will go unreviewed if the decision below is not reversed and the stay that is now in effect is allowed to expire.

I.

WHETHER SECTION 10 IS UNCONSTITUTIONALLY VAGUE UNDER THE HEIGHTENED SCRUTINY REQUIRED FOR STATUTES DIRECTED AT SPEECH AND LACKS ESSENTIAL PROCEDURAL SAFEGUARDS ARE IMPORTANT ISSUES OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

The Due Process Clause of the Fifth Amendment requires that statutes and regulations not be so vague that affected parties are uncertain as to what actions are proscribed and that government officials have unbridled discretion in their enforcement decisions. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). This constitutional condemnation of vague laws applies with

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[5] Such a direct conflict between a court of appeals decision and a well-reasoned district court decision has served as the basis for the grant of a writ of certiorari. *Massachusetts v. United States*, 435 U.S. 444, 453 (1978); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 n.3 (1981); *Heffron v. International Soc'y for Krisha Consciousness*, 452 U.S. 640, 646 n.9 (1981); *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964).

special force when First Amendment rights are at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Moreover, statutes banning certain speech must include sufficient procedural safeguards "to obviate the dangers of a censorship program." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Section 10 meets none of these standards.

In particular, section 10 is impermissibly vague for at least three distinct reasons:

- The FCC has defined "indecent programming" as programming that "describes or depicts sexual or excretory activities or organs in a *patently offensive* manner as measured by contemporary *community standards*." Pet. App. 172a (emphasis added).
- Congress authorized cable operators to ban from leased access channels programming that they "*reasonably believe[ ]*" is indecent. Pet. App. 126a (emphasis added).
- Congress authorized cable operators to ban from PEG access channels programming that contains "material soliciting or promoting *unlawful conduct*," which the FCC has defined as "material that is *otherwise proscribed* by law." Pet. App. 127a, 198a (emphasis added).

The FCC's reference to "community standards" or what is "patently offensive" is an entirely subjective standard that provides no guidance to programmers — given the penalties for guessing wrong — or check on the whim or caprice of cable operators. The inevitable result of such vague terms is that arbitrary enforcement will be wide-spread: cable operators will censor, and programmers will self-censor, important and valuable programming — such as the offerings of DAETC on arts censorship, safe sex, or gay rights — simply because it may have some sexual content or vulgar words. *See Grayned*, 408 U.S. at 108-09.

Moreover, Congress' use of the phrase "reasonably believes" substantially augments section 10's problems, because what cable

operators "reasonably believe" is indecent is a larger and even vaguer category than what actually is "indecent" (to the extent that term has any meaning), resulting in the ban of non-"indecent" speech and heightened arbitrariness and self-censorship. *See Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 781-82 (C.D. Cal. 1991) (requirement that artists certify that none of their works may be considered obscene in the NEA's judgment is void for vagueness).[6]

Obscenity jurisprudence does not redeem the use of "community standards" in the definition of indecency. Obscenity deals only with "hard-core" pornography, *Miller v. California*, 413 U.S. 15, 27 (1973), which Justice Stewart memorably described with the phrase "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). By contrast, "indecency" encompasses a broad and undefined category that may well extend beyond even "soft-core" pornography and that no member of this Court has ever suggested is recognizable on sight. Additionally, the consideration of "serious value" in obscenity jurisprudence, *i.e.*, literary, artistic, political, and scientific merit, allows speakers to make predictive judgments and courts to develop over time substantive guidance for both speakers and censors. *See id.* at 24. The FCC's "indecency" definition allows for no such safe-predictions or guidance.

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[6] The sum of section 10's chilling effect is exacerbated by the statutory and regulatory certification requirements: the programmer must certify whether any of its programming contains material that is "indecent" under the FCC's definition, is indecent according to the cable operator's "reasonable belief," or is "otherwise proscribed by law." Pet. App. 172a, 198a. As this Court held in *Baggett v. Bullitt*, "[t]he uncertain meanings of . . . oaths require the oath-taker . . . to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (citation omitted); *see Bella Lewitzky*, 754 F. Supp. at 782-83.

Clearly, the overall result of section 10's multiple vagueness problems is harmful self-censorship by artists and other programmers and unbridled discretion vested in the FCC and its cable operator delegates to censor where programmers do not self-censor. This Court has repeatedly condemned vague laws for precisely these reasons. *E.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 283-84 (1961).

Equally inconsistent with what three decades of First and Fifth Amendment cases have required is the lack of essential procedural safeguards accompanying Congress' joint censorship enterprise with cable operators; safeguards that are mandated "to obviate the dangers of [section 10's] censorship program." *Freedman v. Maryland*, 380 U.S. at 58. Section 10 and the FCC's implementing regulations provide no procedural safeguards whatsoever. *See* Pet. App. 126a-27a, 171a-73a, 197a-98a. Indeed, in the discussion portion of the First Report and Order, the FCC states that it "do[es] not envision disputes arising [under sections 10(a) and (b)] except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent" by the cable operator or a subscriber; in such cases, the FCC states that it will entertain special relief petitions from the cable operator or the complaining subscriber. Pet. App. 167a-68a.

This is not the type of "safeguard" required by the Due Process Clause in the First Amendment censorship context: prior procedural mechanisms to protect the speaker being censored, with, at a minimum, provisions for prompt judicial review initiated by the censor, who must bear the burden of proof. *Freedman v. Maryland*, 380 U.S. at 58-59; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975). The FCC's statement (even if it were binding) provides no such *prior* procedural safeguards to protect *programmers* from uncontrolled

censorship; rather, it serves only to give further procedural power to censoring cable operators.[7]

In response to these concerns, the court of appeals held in a one-page discussion that Petitioners' vagueness arguments are foreclosed because the FCC will resolve any conflicts as to what is "indecent" programming, and because prior decisions — *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) ("*ACT I*"), and *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507-08 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) ("*ACT II*") — had decided that any vagueness challenge was foreclosed by *FCC v. Pacifica Communications Comm'n*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[8]

The holding that *Pacifica* disposes of Petitioners' vagueness challenge is in conflict with all the cases cited above at 11-14. *Pacifica* did not overrule the principles approved in those cases and, indeed, did not address the vagueness of the FCC's

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[7] Section 10's vagueness and due process deficiencies are further illustrated by analogy to a series of decisions striking down statutes that delegated governmentally enforceable censorship standards to the private motion picture industry rating system. *National Ass'n of Theatre Owners v. Motion Picture Comm'n*, 328 F. Supp. 6 (E.D. Wis. 1971); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970); *Motion Picture Ass'n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970). These courts consistently held that governmental delegation to private groups of the power to evaluate and label films for purposes of establishing censorship standards enforceable by law violates the most fundamental principles of due process. Here, similarly, the government has defined — albeit vaguely — the content of the material it wishes to see censored, has delegated the application of the standard in the first instance to private parties, and has given them every encouragement to censor; all without any clear boundaries or procedural safeguards.

[8] The court of appeals reached this issue only as to section 10(b), inexplicably concluding that the remainder of the statute was not state action to which constitutional scrutiny applied. *See*, below, point II.

indecency definition. Moreover, it certainly did not deal with a statute involving the added phrase "reasonably believes" or with the delegation to private censors of the duty to decide (with no semblance of due process safeguards) what falls under a governmentally defined standard. As for section 10(c), *Pacifica* would not control even if it had decided the vagueness question, because section 10(c) deals with the distinct — and completely vague — category of material that "solicit[s] or promot[es] unlawful conduct," rewritten by the FCC to mean material "otherwise proscribed by law."

Additionally, the majority did not consider the vagueness of section 10 under the heightened scrutiny required of statutes impacting speech. This refusal conflicts with applicable decisions of other courts of appeals. *E.g.*, *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (emphasizing the importance of heightened vagueness scrutiny and striking down a statute regulating the sale of "violent" videos); *Shamloo v. Mississippi State Bd.*, 620 F.2d 516, 523-24 (5th Cir. 1980) (applying a heightened scrutiny to a statute's use of the term "wholesome").

The *Pacifica* Court's self-described narrow, plurality, as-applied decision that the FCC's "indecency" definition could be retrospectively applied to seven "dirty" words is not authority for upholding (as the court below did) a delegation to private parties — with their own self-interests at heart — of the power to censor anything that they "reasonably believe" to be indecent.[9]

In short, the court of appeals far too casually swept aside an important issue that merits being settled by the Court.

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[9] Moreover, the court in *ACT I* was notably tentative in describing *Pacifica*'s "implicit" resolution of the vagueness issue and "welcome[d]" correction from "Higher Authority." 852 F.2d at 1339 (Ginsburg, J.). With Congress increasingly considering "indecency" as a censorship standard, it is time for the Court to accept now-Justice Ginsburg's invitation.

II.

WHETHER CONTENT-BASED AND SPEAKER-BASED FEDERAL STATUTORY PROVISIONS AIMED AT SPEECH CAN BE IMMUNE FROM CONSTITUTIONAL SCRUTINY SIMPLY BECAUSE THEY DELEGATE CENSORSHIP DETERMINATIONS IN PART TO PRIVATE PARTIES IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

Where Congress seeks to regulate protected speech on the basis of its content or only if uttered by certain speakers, its regulation is subject to strict scrutiny and will be upheld — if at all — only if the government shows that the regulation is narrowly tailored and the least restrictive means of advancing a compelling interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Because it regulates only "indecent programming" on leased and PEG access cable channels, section 10 is both content- and speaker-based. Moreover, section 10's censorship scheme undeniably extends to speech containing significant literary, artistic, political, or scientific value that is fully protected under the First Amendment. *Id.*

The government has conceded that sections 10(a) and (c) would be unconstitutional if strict scrutiny applied and does not contest that section 10(b) is subject to strict scrutiny; propositions that the court of appeals accepted. Pet. App. 11a, 32a; *see id.* 104a n.9. However, focusing incorrectly on future censorship actions of cable operators rather than on section 10 itself, the government argued that any acts of censorship by cable operators are not attributable to the state and, therefore, because the Constitution does not constrain private parties and because sections 10(a) and (c) merely "restore" cable operators' editorial control by giving them authority to ban "indecent programming," sections 10(a) and (c) are not subject to strict scrutiny. The majority agreed with this analysis and conclusion. Pet. App. 22a-23a.

That approach, however, asks the wrong question and supplies the wrong answer. *Cf. Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 965 (1995).* As explained by Judge Wald, this is not a case about whether cable operators should be regarded as state actors with respect to particular censorship decisions; rather, this case challenges the statute and implementing regulations themselves, which delegate to cable operators the power to "ban" a category of speech based upon its content; a power that they did not enjoy with respect to access programming prior to section 10's enactment and still do not enjoy as far as any other category of access speech is concerned. Pet. App. 50a & n.4 (Wald, J., dissenting).

The court of appeals' unprecedented holding that sections 10(a) and (c) are not subject to constitutional scrutiny should be reviewed by the Court for two reasons: first, the loophole it creates would allow Congress to regulate free from the confines of the Constitution; second, it derogates from well-established, applicable decisions of this Court making clear that duly enacted legislation is always "state action" that must operate within constitutional bounds.

In section 10, Congress and the FCC defined a category of speech on cable according to its content ("indecent programming"), singled that category out for special adverse treatment (banning, blocking, certification), and limited that treatment to only certain producers of that category of speech (cable access programmers). Further, the FCC has undertaken to resolve certain disputes between and among cable operators, programmers, and subscribers over the proper application of its definition of "indecency." Pet. App. 166a-68a. Notably, as to leased access programming, Congress has required — not just authorized — cable operators to suppress indecent programming: if they do not ban this speech pursuant to section 10(a), they must block it pursuant to section 10(b).

Congress has created this scheme — so precisely targeted to one solitary form of congressionally disfavored speech that it cannot possibly be termed simply the "restoration" of editorial

control — yet the court of appeals held that sections 10(a) and (c) are not subject to First Amendment scrutiny because any resulting censorship is delegated in the first instance to private parties. The court of appeals' rationale is equally applicable to other subjects of regulation, such as those that are otherwise subject to the Equal Protection Clause or the Takings Clause, but which may now avoid such constraints as long as the actual adverse treatment is at all conditional on a private party. Apparently, a statute authorizing private parties to destroy printing presses of publishers of some political stripe, or privileging persons to assault persons of color, would escape constitutional scrutiny under the same reasoning.

The court of appeals' holding is flatly in conflict with all applicable decisions of this Court.[10] First, no statute has ever been held not "state action." As Professor Tribe has noted, "[i]f litigants challenge a federal or state *statute* . . . in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 18-1 at 1688 (2d ed. 1988).

Second, the court of appeals ignored *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), which was brought to the court's attention by Petitioners but not even mentioned in the majority's opinion. As described in *Hanson*, the Railway Labor Act initially prohibited private railroads and unions from entering into privately bargained "union shop agreements," but was later amended to authorize affirmatively such agreements, thereby "restoring" private power. The Court held that, although this revised statutory provision was only permissive and did not

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[10] Additionally, the decision below is directly contrary in findings and result to the well-reasoned decision in *Altmann*, 849 F. Supp. 1335, which considered sections 10(a) and (c) to be state action and struck them down.

compel action, it was nonetheless subject to First Amendment scrutiny because

> the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

Id. at 231-32 (footnote and citations omitted). The court of appeals' holding is directly contrary to that of the Court in *Hanson*.

Third, sections 10(a) and (b) establish a comprehensive scheme to censor "indecency" on leased access channels with private cable operators and the FCC playing interlocking roles: the FCC defines indecency, resolves certain disputes over its application, and prescribes blocking and segregation requirements, while the cable operators determine what programming falls within their "reasonable belief" of indecency and decide whether to ban or block such programming. Such a joint enterprise between government and private actors is subject to constitutional scrutiny. *See Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

Similarly, the court of appeals' holding directly contradicts *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989), which specifically held that private drug tests permitted but not compelled by statute gave rise to Fourth Amendment scrutiny because, as in the present case, "the Government did more than adopt a passive position towards the underlying conduct." The court of appeals completely ignored this ruling in *Skinner*, as well.[11]

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[11] The in banc majority's opinion also conflicts with a number of this Court's other cases applying the "state action" doctrine — including the (continued...)

III.

WHETHER SECTION 10(B) VIOLATES THE FIRST AMENDMENT AS NOT THE LEAST RESTRICTIVE MEANS TO ACHIEVE A COMPELLING GOVERNMENT INTEREST AND AS UNJUSTIFIABLY UNDERINCLUSIVE IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

A statute or regulation that imposes content-based restrictions on protected speech must be found unconstitutional either if it is unjustifiably underinclusive or not narrowly drawn and carefully tailored or if the government fails to prove that it is the least restrictive means of achieving a compelling governmental interest. *Sable*, 492 U.S. at 126.[12]

Section 10(b) requires cable operators to block all speech on leased access channels that programmers have identified as falling within the definition of "indecent programming," and which cable operators have not outright banned under section 10(a) (or which programmers have not already self-censored). As such, it is a

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[11](...continued)
"significant encouragement" test of *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), and the warning in *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (Burger, C.J.), that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'" — as well as with this Court's jurisprudence on the regulation of speech in "public fora," which Congress, the FCC, and the courts have repeatedly characterized access cable channels as being.

[12] As noted by Chief Judge Edwards in disagreement with the majority, speech on cable is not subject to the lesser First Amendment scrutiny sometimes afforded broadcast speech. Pet. App. 81a-82a (Edwards, C.J., dissenting) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994)).

content-based restriction on protected speech subject to the underinclusiveness and strict-scrutiny tests.[13]

Section 10(b) is unjustifiably underinclusive because it only blocks "indecent programming" on leased access cable channels, without also regulating "indecent programming" on commercial cable channels. This results in allowing cable operators to cablecast on their own unblocked commercial channels their own "indecent programming" (that would be subject to blocking if it were designated for leased access channels) and even the very same "indecent programming" that they banned or blocked from the regular leased access channels.

In other similar situations, this Court has held such underinclusive, speaker-based discrimination unconstitutional because it did not substantially advance the government's asserted interest or because the statutory distinctions were not justified by necessity. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (statute prohibiting publication of rape victim's name only applied to instruments of mass communication); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (statute prohibiting speech by noncommercial educational broadcasting stations only applied to "editorializing"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (statute prohibiting corporations from paying for publicizing opinions only applied to banks and their views on a state income tax amendment).

Nonetheless, on this important issue, the court of appeals ruled that section 10(b) is not underinclusive — relying on the "Congress may take one step at a time" approach that this Court has consistently held not applicable in the First Amendment realm — and did not require the distinction made by the statute to be

[13] The government conceded that, if its state action argument were not accepted, sections 10(a) and (c) should be found unconstitutional. Pet. App. 104a n.9. Even had it not so conceded, these sections are clearly unconstitutional because they effect a total ban on speech, which is even further from being the least restrictive means than is section 10(b). *Sable*, 492 U.S. at 127.

justified as necessary. *Compare* Pet. App. 39a-40a *with Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (interest in taxation does not justify content-based differential incidence of tax); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (interest in lowering noise level did not justify differential treatment of labor picketing from non-labor picketing).

Additionally, the government has not borne its burden of proving that section 10(b) is the least restrictive means to achieve any compelling governmental interest.[14] Since 1984, Congress has mandated that cable operators provide a "lockbox" to every subscriber, 47 U.S.C. § 544(d)(2), having found during lengthy committee hearings and floor discussions that lockboxes are a very effective and efficient means of individually regulating what is viewable in one's own home, *e.g.*, H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984).[15] There is no demonstration in section 10's legislative history — indeed, there are no congressional findings as to section 10 at all — that lockboxes are no longer a sufficient means of meeting any asserted compelling governmental interest underlying section 10 or otherwise.

Moreover, section 10(b) requires subscribers who want to continue to have access to this category of governmentally

[14] Even assuming that the government's asserted interest behind section 10 is "compelling," an issue on which Chief Judge Edwards has expressed doubts which Petitioners share, *see* Pet. App. 82a-84a (Edwards, C.J., dissenting), there was certainly no showing demonstrated in the congressional findings of harm to minors from possible exposure to a vaguely defined category of "indecent" speech.

[15] Lockboxes allow a subscriber to block and unblock any channel at any time, generally by programming their lockbox and using a numerical code or mechanical lock that the subscriber controls. Pet. App. 36a. By contrast, the segregation and blocking requirement of section 10(b) forces the targeted speech to be placed on a separate channel that is automatically blocked by the cable operator; a subscriber may view programming on that channel only if a request is made in writing and only after the operator complies with that request, for which it has thirty days.

targeted and disfavored speech to so request affirmatively and in writing. Even assuming that it is necessary or appropriate to segregate some, but not all, "indecent" programming on a specific channel, the burden should be on those who want to block access to constitutionally protected speech, rather than on those who seek access to it.[16] *Cf. Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965) (public "is likely to feel some inhibition in sending for literature which federal officials have condemned"). In any event, the First Amendment cannot tolerate making subscribers wait for up to thirty days for unblocking, by which time any programs that led to the unblocking request will have been missed.

Nonetheless, with little analysis and complete silence on the First Amendment rights of adults and older minors, the court of appeals held that section 10(b)'s total blocking of "indecent programming" on leased access channels was the least restrictive means of achieving the asserted "compelling" interest. Pet. App. 36a.

Section 10(b)'s constitutionality under the First Amendment is an important issue that the Court should settle, made even more so by the court of appeals' disregard for applicable decisions of the Court.

[16] This could be easily accomplished by requiring cable operators to notify subscribers (by flier accompanying the monthly bill or by statements between programming) that segregated channels carrying "indecent" programming can be either entirely blocked by the cable operator until otherwise requested or blocked on a program by program basis by the subscriber using the lockbox.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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New York, New York
July 18, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1169 **September Term, 1994**

Alliance for Community Media, et al.,
Petitioners

v.

Federal Communications Commission
and United States of America,
Respondents

and consolidated cases

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of the Motion to Stay Issuance of In Banc Court's Mandate pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court, it is

ORDERED, by the Court in banc, that the motion is granted and the Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Filed July 10, 1995

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *In Banc* October 19, 1994 Decided June 6, 1995

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1171

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC.;
AMERICAN CIVIL LIBERTIES UNION,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1270

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1276

AMERICAN CIVIL LIBERTIES UNION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

I. Michael Greenberger argued the cause for petitioners. With him on the briefs were *Charles S. Sims, Lisolette E. Mitz, Marjorie Heins* and *Arthur B. Spitzer* for petitioners Denver Area Educational Telecommunications Consortium, Inc. and the American Civil Liberties Union, *David A. Bono, Michael K. Isenman* and *David B. Goodhand* for petitioners the Alliance for Community Media, the Alliance for Communications Democracy, and People for the American Way, *James N. Horwood* for petitioners the Alliance for Community Media and the Alliance for Communications Democracy, *Andrew J. Schwartzman* and *Elliot Mincberg* for petitioner People for the American Way.

Jacob M. Lewis, Attorney, Department of Justice, argued the cause for respondents. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, and *Barbara L. Herwig*, Attorney, Department of Justice, *William E. Kennard*, General Counsel, *Christopher J. Wright*, Deputy General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Gregory M. Christopher*, Counsel, Federal Communications Commission.

Robert T. Perry was on the brief for intervenors New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon. *Daniel L. Brenner, Neal M. Goldberg* and *Diane B. Burstein* were on the brief for intervenor National Cable Television Association, Inc. *H. Robert Showers* was on the joint brief for *amici curiae* National Law Center for Children and Families. With him on the joint brief were *James P. Mueller* for National Family Legal Foundation and *Paul McGeady* for Morality in Media, Inc.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* WALD, in which *Circuit Judge* TATEL joins and *Circuit Judge* ROGERS joins as to Parts II and III.

Opinion dissenting in part filed by *Chief Judge* EDWARDS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge*: This case is here on petitions for review of two orders of the Federal Communications Commission implementing section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j), & 558). Petitioners are five organizations, some of whose members produce programming for cable "access" channels; an individual "access" programmer; and two other groups whose members watch cable television. The case was argued first to a panel of the court, which remanded it to the Commission on the grounds that sections 10(a) and 10(c) violated the freedom of speech clause of the First Amendment to the Constitution and that section 10(b), and the Commission's regulations thereunder, posed such serious constitutional questions that the Commission ought to reconsider the matter in light of the unconstitutionality of sections 10(a) and 10(c). *Alliance for Community Media v. FCC*, 10 F.3d 812, 823-24, 829 (D.C. Cir.1993). The full court vacated the panel's judgment. *Alliance for Community Media v. FCC*, 15 F.3d 186 (D.C. Cir.1994). On rehearing the case *in banc*, we sustain section 10 and the Commission's regulations.

I

The Commission gradually began asserting jurisdiction over a form of cable television — community antenna television systems — in the early 1960's. Through that decade and into the next, the pace of regulation intensified. By 1980, however, the trend had reversed itself. The cable industry experienced substantial federal deregulation, driven in no small measure by the Supreme Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The Court there struck down, as beyond the Commission's statutory authority over broadcasting, its 1972 rules (as modified by its 1976 rules) requiring cable operators to dedicate four of their "channels for public, governmental, educational, and leased access." *Id.* at 691. Cable operators "own the physical cable network and transmit

the cable signal to the viewer." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2452 (1994). By "transferr[ing] control of the content of access cable channels from cable operators to members of the public," the Commission had — the Court held in *Midwest Video* — transformed cable operators into "common carriers." 440 U.S. at 700, 701. Congress had prohibited the Commission from imposing common-carrier obligations on broadcasters because this would intrude on their editorial control over programming. *Id.* at 705. Cable operators were situated similarly. They shared "with broadcasters a significant amount of editorial discretion regarding what their programming will include," and, like broadcasters, could not be burdened with common carrier obligations without Congress' express direction. *Id.* at 707, 709.

The Cable Communications Policy Act of 1984 revived much of the agency-created system struck down five years earlier in *Midwest Video*. The 1984 Act compelled cable operators of systems with more than thirty-six channels to set aside between 10 and 15 percent of their channels for commercial use by persons unaffiliated with the operator. 47 U.S.C. § 532(b). On these "leased access" channels, the statute forbade the operator from exercising "any editorial control over" the programming, "except that an operator may consider such content to the minimum extent necessary to establish a reasonable price" for the use of the channel. 47 U.S.C. § 532(c)(2). In return, the 1984 Act exempted operators from criminal and civil liability arising from programs carried on leased access channels. 47 U.S.C. § 558 (amended 1992). While thus removing the operators' control over and legal responsibility for leased access programming, the 1984 Act empowered local franchising authorities to bar or regulate such programming if, in the authority's judgment, it "is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States." 47 U.S.C. § 532(h).

The 1984 Act also authorized local franchising authorities to require, as a condition for a franchise or for the renewal of one, that operators set aside "channel capacity" for "public, educational, or governmental use." 47 U.S.C. § 531. Subject to section

544(d), cable operators were forbidden from exercising any editorial control over programming shown on these "PEG access" channels. 47 U.S.C. § 531(e) (amended 1992). Section 544(d)(1) permitted cable operators and franchise authorities to specify that cable services would not be provided if they are "obscene or are otherwise unprotected by the Constitution." As with leased access, section 558 of the 1984 Act relieved cable operators from criminal and civil liability for programs carried on PEG channels.

In "order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber," section 544(d)(2) required cable operators to provide equipment — commonly known as a "lockbox" — enabling the subscriber to block a channel during particular periods. 47 U.S.C. § 544(d).

In 1992, for reasons we describe below, *see infra* pp. 19-20, Congress decided that revisions were needed in the 1984 Act's treatment of leased access and PEG access channels. Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, which is set forth in the margin,[1] altered the existing system

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[1] Sec. 10. Children's Protection From Indecent Programming on Leased Access Channels

(a) Authority to Enforce. — Section 612(h) of the Communications Act of 1934 (47 U.S.C. 532(h)) is amended —

(1) by inserting "or the cable operator" after "franchising authority"; and

(2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.".

(b) Commission Regulations. — Section 612 of the Communications Act of 1934 (47 U.S.C. 532) is amended by inserting after subsection (i) (as added by section 9(c) of this Act) the following

(continued...)

in several ways. Section 10(a) permitted a cable operator to refuse

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[1](...continued)

new subsection:

"(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

"(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

"(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

"(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

"(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).".

(c) Prohibits System Use. — Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

(d) Conforming Amendment. — Section 638 of the Communications Act of 1934 (47 U.S.C. 558) is amended by striking the period at the end and inserting the following: "unless the program involves obscene material.".

Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, § 10, 106 Stat. 1460, 1486 (1992) (codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558).

to carry leased access programming the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pub. L. No. 102-385, § 10(a), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(h)). In order "to limit the access of children to indecent programming," section 10(b) directed the Commission to prescribe rules requiring cable operators who choose to carry indecent programming on leased access channels to place such programs on a separate channel and to block the channel until the subscriber, in writing, requests unblocking. *Id.* § 10(b) (to be codified at 47 U.S.C. § 532(j)). Section 10(c) required the Commission to promulgate regulations enabling cable operators to prohibit the use of PEG access channels for "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." *Id.* § 10(c) (to be codified at 47 U.S.C. § 531). Section 10(d) eliminated cable operators' immunity from criminal and civil liability for obscene programming shown on access channels. *Id.* § 10(d) (to be codified at 47 U.S.C. § 558).

In early 1993, the Commission released two Reports and Orders adopting regulations to implement section 10. In the first, the Commission issued regulations implementing sections 10(a) and 10(b), the provisions applying to leased access channels. The Commission defined "indecent" programming in terms nearly identical to those contained in the statute: "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76 701(g)). Leased access programmers were required to inform the cable operator which, if any, of their programs fell into that category. *Id.* (to be codified at 47 C.F.R. § 76.701(d)). Mirroring the statute, the regulations authorized private cable operators to refuse to carry indecent programming on leased access channels; or, if they decided to do so, to segregate that material on a blocked channel. *Id.* (to be codified at 47 C.F.R. § 76.701(a)). A cable

operator must satisfy a subscriber's written request to receive a blocked channel within thirty days. *Id.* (to be codified at 47 C.F.R. § 76.701(c)).[2]

The Commission's second Report and Order contained regulations implementing section 10(c), which applies to PEG access channels. These regulations authorized cable operators to prohibit programming on PEG access channels if it "contains obscene material, indecent material . . . , or material soliciting or promoting unlawful conduct."[3] *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

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[2] With respect to leased access channels, the 1992 Act also directed the Commission to determine the maximum reasonable rates for leased access use, to establish reasonable terms and conditions for such use, including those for billing and collection, and to create procedures for expedited resolution of rate or carriage disputes. Pub. L. No. 102-385, § 9, 106 Stat. 1460, 1484-86 (1992) (codified at 47 U.S.C. § 532(c)(4)(A)(i)-(iii)). The 1984 Act had permitted operators to negotiate with programmers the prices and terms for leased access. DANIEL L. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.05, at 6-50, 6-57 (1994). For PEG access programming, the 1984 Act authorized local franchising authorities to determine minimum PEG requirements, including allocation of channel capacity to users, availability of equipment and facilities, charges for costs, and requirements that PEG access channels be included in the basic cable tier. Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM. L.J. 1, 147-48 (1991). The 1992 Act explicitly authorized franchising authorities, when awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." Pub. L. No. 102-385, § 7(b), 106 Stat. 1460, 1483 (1992) (codified at 47 U.S.C. § 541(1)(4)(B)).

[3] The regulations define "material soliciting or promoting unlawful conduct" as "material that is otherwise proscribed by law." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

The regulations permitted cable operators to require PEG access programmers to certify that their programming contains no material in these categories. *Id.*

II

A

Obscenity has no constitutional protection, and the government may ban it outright in certain media, or in all. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992). But an "indecent" program, as the Commission and the statute define the term, is not necessarily an obscene program.[4] While the government may nevertheless restrict the showing of indecent programs, it may do so only in a manner consistent with the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). If decisions of cable operators not to carry indecent programs on leased or PEG access channels, decisions sections 10(a) and 10(c) permit, were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these provisions.

So far as sections 10(a) and 10(c) and the corresponding regulations are concerned, the case therefore turns on the presence

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[4] An indecent program is one that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(g)). As all agree, this definition of indecency does not encompass all of the elements of obscenity. A work is legally obscene, according to *Miller v. California*, 413 U.S. 15, 24 (1973), if (a) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ;" (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

or absence of "state action." The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press" restricts only the government. It does not control private conduct. Before one may determine whether actions taken by cable operators with respect to indecent programming on leased and PEG access channels comport with the First Amendment, one must decide whether those actions may be attributed to the government.

Petitioners initially deny that the case presents any serious state action problem: Congress enacted section 10(a) and section 10(c), and a federal agency issued regulations putting the provisions into effect; these were official actions of the government; hence state action exists. Matters are not quite so simple, however. If the government had commanded a particular result, if it had ordered cable operators to ban all indecent programs on access channels, the operators' compliance would plainly be attributable to the government. *See Action for Children's Television v. FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir.1991), *cert. denied*, 112 S. Ct. 1281 (1992). State action would exist for the same reason that the government's compelling private entities to conduct searches renders the ensuing searches subject to the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). But sections 10(a) and 10(c) do not command. Cable operators may carry indecent programs on their access channels, or they may not. It is true that the Supreme Court has found state action even though legislation, rather than compelling a result, left the matter to the discretion of private actors. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), are such decisions. But neither *Larkin* nor *Loretto* resembles the case before us. State action existed in both of those cases because the government conferred on private parties power that "traditionally [had been] the *exclusive* prerogative" of the government (*San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987)), in *Larkin* the power to veto liquor licenses, in *Loretto* the power to enter and occupy private property without the owner's consent. By contrast, determining what programs shall be shown

on a cable television system is not traditionally within the exclusive province of government at any level. That section 10 is a federal statute authorizing action by private cable operators is therefore not itself sufficient to trigger the First Amendment. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 165-66 (1978).

The question remains whether section 10 and the regulations establish a "sufficiently close nexus" between the government and cable operators regarding indecent programming on access channels so that state action is present. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); Skinner, 489 U.S. at 615. We agree with petitioners that the question must be answered in view of the precise nature of their objection. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). But what is the nature of their objection? One frame of reference reveals "a battle for supremacy between the asserted rights of private persons." Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 230. That is, petitioners are merely complaining about section 10(a)'s and section 10(c)'s restoring to cable operators' *their* option to reject indecent programming on *their* cable systems. Cable operators "are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. at 2456. When an operator decides what programming will appear on its system, the operator engages in free speech. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. at 707. It is therefore easy to see how sections 10(a) and 10(c), by giving operators editorial control over indecent programming on their systems' access channels, promote the operators' freedom of speech.[5] Petitioners, on the other hand, do not spell out in their briefs exactly how the same provisions retard their freedom of

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[5] We express no view on whether the provisions of the 1984 and 1992 Acts requiring cable operators to set aside leased access channels and permitting franchising authorities to force operators to set aside PEG access channels infringe upon the First Amendment rights of cable operators or programmers.

speech. We gather from their submissions to the Commission that they have members who wish to watch programs on access channels describing or depicting "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium"; and that the programmers who count themselves among the petitioners wish to produce this sort of material for television. These interests will be damaged, petitioners told the Commission, because sections 10(a) and 10(c) will reduce the amount of indecent programming on cable access channels. The idea appears to be that if legislation altering the existing state of affairs threatens to lessen the quantity of indecent speech, the government bears the legal responsibility for the private decisions causing that result.

The question naturally arises — less indecent programming as compared to what? The status quo ante? If the state of affairs under the 1984 Act were the baseline from which to measure, as petitioners assume without stating why, their assessment of section 10's impact might be accurate. The 1984 Act did not permit cable operators to decline indecent programming on access channels; after the 1992 amendment, they had that option. But what of the period before 1984? The Supreme Court's 1979 decision in *Midwest Video* relieved cable operators of the obligation, then imposed by regulation, to provide leased access and PEG access channels. Under those early regulations, operators were required — with respect to both types of access channels — to establish rules prohibiting the "presentation of . . . obscene and indecent matter." 47 C.F.R. § 76.256(d)(1)-(2) (1976); *see Midwest Video*, 440 U.S. at 693 n.4. As compared to the situation before the 1979 *Midwest Video* decision, when indecent programming on access channels was entirely forbidden, section 10 of the 1992 Act permits more — not less — such programming. Still another comparison presents itself. Rather than focusing only on the pre-1992 and post-1992 situations with respect to access channels, one might contrast access channels with other cable channels. Cable operators have always had the discretion not to carry indecent programming on their non-access channels. Yet no one would contend that the First Amendment constrained the operator's editorial judgment in this regard. We

therefore cannot agree with the premise implicit in petitioners' arguments — that the 1984 Act gave rise to the constitutionally proper quantity of indecent access programming. The First Amendment did not compel the 1984 Act, and it certainly did not compel prohibiting cable operators from exercising any editorial control over access programming.

This, we believe, places in the proper perspective petitioners' charge that section 10 of the 1992 Act "establishes" a "procedural scheme of private censorship." Brief for Petitioners at 20, 27. If "censorship" is understood as editorial control, petitioners are partly correct, but their description does not translate into state action. The 1984 Act also initiated what may be described as a system of "private censorship." From 1984 until 1992, Congress gave private parties in charge of programming on leased access channels complete control, free from any operators' oversight, regarding what the cable television audience could see on these channels. During that eight-year period, programmers were the ones exercising control over the content of access programming. In petitioners' terms, they were the ones acting as "private censors." When the 1992 Act gave cable operators the option of vetoing decisions of access programmers to televise indecent programs, it simply adjusted editorial authority between two private groups.

As we see it, therefore, petitioners have merely discovered an inherent characteristic of cable systems: the more discretion a cable operator has over what will appear on its system, the less discretion resides in those who have been given access to the operator's system (and vice versa). To suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating. No analogous state action decision of the Supreme Court — including *Reitman v. Mulkey*, 387 U.S. 369 (1967), from which the original panel took "specific guidance" and on which it relied almost exclusively for its state action analysis

(*Alliance for Community Media*, 10 F.3d at 818-22) — has ever gone so far.

Reitman may have leapt to mind because it too involved legislation modifying statutory restrictions on private parties. But not much can be made of the case for our purposes, certainly not nearly as much as the original panel made of it. Petitioners seem to share our judgment. *Reitman* is cited but once in their *in banc* briefs, and then only in a footnote to support the notion that it embodies a state action standard no different than *Blum v. Yaretsky*, which we will discuss more fully in a moment. Brief for Petitioners at 32 n.16. *Reitman* began as a suit between private parties, with the plaintiffs claiming they had been denied an apartment on the basis of their race in violation of a state housing law. In 1964, while the suit was pending, California voters approved Proposition 14, a state constitutional amendment (Art. I, § 26) prohibiting the state or any subdivision or agency thereof from denying or limiting the right of any person to sell, lease or rent his real property to any "persons as he, in his absolute discretion, chooses." 387 U.S. at 371. One effect of adding § 26 to the state constitution was to repeal the state law prohibiting private racial discrimination in housing. If this were all § 26 accomplished, the case might have come out differently: "simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford v. Board of Educ.*, 458 U.S. 527, 539 (1982). But in *Reitman*, Justice White, speaking for four other Justices, demonstrated the fallacy of thinking § 26 had only the effect of repealing antidiscrimination legislation. 387 U.S. at 376. "The section struck more deeply and more widely." *Id.* at 377. "Private discriminations in housing . . . enjoyed a far different status [after enactment of § 26] than was true before passage of [the state] statutes" outlawing private racial discrimination. *Id.* After § 26, minority groups who sought new fair housing laws in California would somehow have to get the state constitution amended before they could even attempt to convince the legislature to enact such laws, while those seeking other legislation could proceed directly to the legislature. By placing this

impediment in the way of new anti-discrimination measures, § 26 itself discriminated against minority groups, and for that reason constituted action of the state forbidden by the Fourteenth Amendment.

This has long been the accepted understanding of *Reitman*. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 420 (1990); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1700 (2d ed.1988); Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 75, 82 (1967); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 247; Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 51.[6] So understood, the decision cannot support a finding of state action here.Congress may modify section 10 of the 1992 Act anytime it chooses, just as it modified the related provisions of the 1984 Act.There are no special impediments to its doing so.

Apparently recognizing this, petitioners invoke not *Reitman*, but the statement in *Blum v. Yaretsky*, 457 U.S. at 1004, that "although the factual setting of each case will be significant," the government "normally" can be held accountable for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." The Court followed this qualified declaration with another qualification: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for

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[6] The panel opinion deemed it "not critical" that "*Reitman* involved an amendment to the state constitution that also banned future enactment of fair housing laws without an additional amendment of the state constitution." *Alliance for Community Media*, 10 F.3d at 820 n.8. The Supreme Court in *Reitman* and in *Crawford*, and each of the authors cited in the text, thought the opposite.

those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004-05.

The "coercive power" element in the *Blum* formulation has no application here for reasons already suggested. Rather than coerce cable operators, section 10 gives them a choice.[7] Section 10(b)'s segregation and blocking requirements apply to "cable operators [who] have not *voluntarily* prohibited" indecent programming on leased access channels.Pub.L. No. 102-385, § 10(b), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(j)(1)) (emphasis added). The Commission too put the matter in those terms. Its first Report and Order states that any prohibition of indecent programming on leased access channels will be "voluntary, not mandatory" and that Congress did not intend cable operators to "act as involuntary government surrogates." First Report and Order, 8 F.C.C.R. 998, 1003 ¶ 30 (1993). Section 10(c) is to the same effect." It instructs the Commission to promulgate regulations *enabling* — not requiring — cable operators to prohibit indecent

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[7] Judge Wald mixes apples and bricks in her four formulations of the combined effect of § 10(a) and § 10(b). Dissent at 5. Take for example, her number 1: "'an operator *must* ban, or in the alternative *must* block'" indecent programming on leased access channels. Operators who block are necessarily operators who have not banned indecent speech. They are carrying such programs on their systems and are leaving to their subscribers the choice of tuning in. Despite all the fancy footwork, the formulations merely report that (1) under these provisions operators now have the editorial discretion to carry or not to carry indecent programming on their leased access channels; and (2) if they opt to carry such programming, they have to comply with § 10(b). To conclude from this that the operators' decisions are state action is the same as saying that if you are deciding whether to enter a particular line of business regulated by the state, your decision whether to enter the business is "state action." You "must" comply with regulations, or you "must" stay out. Or closer to home, Judge Wald would find state action when an Indiana bar decides whether to have nude dancing — in her formulation, the bar either must ban nude dancing or it must block children and others who do not consent to watching the show. *Cf. Barnes v. Glen Theatres, Inc.*, 111 S. Ct. 2456, 2461 (1991).

programming on PEG access channels (Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 531)) and the Commission's implementing regulation provides that cable operators "may" prohibit indecent programming on PEG access channels. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

As to the remaining portion of the *Blum* formula, petitioners offer three ways in which section 10 "has provided such significant encouragement" to cable operators not to carry indecent programming on their PEG and leased access channels that state action must be found. The first borrows from the original panel opinion's assertion "that the immediate objective of the 1992 Act is to suppress indecent material and limit its transmission on access channels" and that "the government wishes to suppress" such material on access channels. *Alliance for Community Media*, 10 F.3d at 820; Brief for Petitioners at 28. There is no doubt that section 10 embodies an objective, but it is one rather different than that described in the passages just quoted. The immediate aim — all that can be discerned from the language of the statute — is to give cable operators the prerogative not to carry indecent programming on their access channels. Experience under the 1984 Act moved Congress to legislate as it did.

"The problem," Senator Helms stated during the floor debate, "is that cable companies are required by law to carry, on leased access channels, any and every program that comes along," including programs that consist of a wide variety of highly indecent material. 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). The Senator described leased access programming in New York City that "depicts men and women stripping completely nude"; another featuring people performing oral sex; a channel with ads promoting "incest, bestiality, [and] even rape"; and a channel in Puerto Rico carrying the Playboy Channel. *Id.* As he also pointed out, leased access channels are "not pay channels, they are often in the basic cable package." *Id.* Senator Thurmond mentioned leased access channels with "numerous sex shows and X-rated previews of hard-core homosexual films," as well as channels with ads for

phone lines letting listeners eavesdrop on acts of incest. *Id.* at 648. PEG channels were also being used, for example, "to basically solicit prostitution through easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone. . . [solicit] illegal activities." *Id.* at 649 (statement of Sen. Fowler); *see also id.* at 650 (statement of Sen. Wirth) (agreeing that public access "clearly . . . has . . . been abused").

Before the Commission, many commenters recognized that indecent programs had been transmitted on cable access channels, both leased and PEG. Time Warner Entertainment informed the Commission that its New York City cable subsidiary carries a leased access program ("Midnight Blue") which "include[s] excerpts from sexually explicit video cassettes and films showing in graphic detail intercourse, masturbation and other sex acts," and which advertises "sex-oriented products and services, such as 'escort services,' 'dial-a-porn' telephone lines and Screw Magazine ('Midnight Blue's' print counterpart)." Comments of Time Warner Entertainment Co., L.P., at 3 (Dec. 7, 1992). The company reported that its leased access channel on which Midnight Blue appears is "usually fully booked with sexually explicit programming" every day "from 10:00 p.m. to 4:30 a.m.," and "the demand for additional time remains high." *Id.* The record before the Commission showed that indecent programming was also a problem on PEG channels. For example, the Commission was informed that programming transmitted over the public access channel serving the City of Tampa, Florida, included "visual depiction[s] of male and female nudity . . . simulated sexual activity, and/or sexually related physical contact between performers and audience members." Comments of City of Tampa, at 2 (Dec. 7, 1992). A Tampa viewer described turning on her local public access channel in prime time and seeing "[t]otally nude women . . . squatting and gyrating so that their genitals were in full view," and "a tape of a totally naked man dancing and screaming obscenities." Comments of Virginia B. Bogue, at 1 (Dec. 4, 1992). And one large cable operator noted that a public access channel on one of its systems transmitted a program "in which an access user,

frontally nude, urinated on a photograph of the President of the United States." Comments of Continental Cablevision, Inc., at 4 n.3 (Dec. 7, 1992).

Congress could consider itself accountable for the appearance of these and other such programs. The 1984 Act made them possible by compelling cable operators to set aside leased access channels and, at the franchising authorities' direction, PEG access channels, and by barring the operators from exercising any editorial judgment over what would be shown there. Whatever may be said in support of indecent programming on access channels,[8] Congress surely does not have to promote it. In dealing with cable television, Congress, no less than states dealing with relations between races, cannot "be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice."[9] *Crawford v. Board of Educ.*, 458 U.S. at 539. Section 10 of the 1992 Act extricated Congress from its promotional role, not by banning indecent programming on access channels, but by permitting cable operators to "police their own systems," which the 1984 Act had prevented them from doing. 138 CONG. REC. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

We have no doubt that among the Members of Congress who voted for the 1992 Act there are those who would applaud any

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[8] "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976); *see FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978).

[9] In light of *Crawford*, 458 U.S. at 538, a State's "mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place" does not make private individuals state actors so that their treatment of others on the basis of race is governed by the Fourteenth Amendment. By analogy, the Constitution did not require Congress to bar operators from exercising editorial control over indecent programming on access channels; and, contrary to Judge Wald (Dissent at 7 n.4), when Congress removed the bar in 1992 it did not transform operators into state actors.

cable operator's decision not to carry indecent programming on access channels, or for that matter, on any channel. Even if we equated the view of some Members with the view of a majority, and even if we pretended that their preferences had somehow manifested themselves in statutory language, this still would not be sufficient to transform a particular operator's decision not to carry indecent programs on its access channels into a decision of the United States. "Mere approval of or acquiescence in the initiatives of a private party," *Blum* reminds us, cannot "justify holding the State responsible for those initiatives," 457 U.S. at 1004-05; *see Flagg Bros. v. Brooks*, 436 U.S. at 164.

Nor does state action result simply because legislation "encourages" the private initiative in the sense of making it possible.[10] *Blum* rejected a procedural due process challenge to decisions of state-subsidized private nursing homes, made without a hearing, to downgrade the level of treatment for patients on Medicaid. Federal Medicaid regulations required nursing homes to maintain different treatment levels and to transfer patients whenever necessary; when a nursing home downgraded a patient's treatment, the State reduced the patient's Medicaid payments. 457 U.S. at 994-95. In *Blum*, the "State was indirectly involved in the transfer decisions . . . because a primary goal of the State in regulating nursing homes was to keep costs down by transferring patients from intensive treatment centers to less expensive facilities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). "State and federal regulations encouraged the nursing homes to transfer

[10] For instance, it cannot be that because access channels came into existence as a result of governmental action, the private day-to-day decisions — by programmers or by cable operators — about what will be shown on those channels embody state action. The federal government may create corporations but the resulting quangos are not, for that reason alone, to be treated as governmental rather than private actors. *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 974-75 (1995); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 543 n.23; *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1125 (D.C.Cir.1985).

patients to less expensive facilities when appropriate." *Id.* The nursing homes' transfer decisions were nevertheless private decisions, dependent upon the medical judgment of physicians, and thus not governed by the Constitution. *Blum*, 457 U.S. at 1012. So too with section 10 of the 1992 Act, which facilitates cable operators' editorial control over indecent programming, but does not dictate the outcome or the criteria operators may use in exercising their judgment about whether such programming appears on their access channels.[11]

The second way in which section 10 satisfies the *Blum* formulation, according to petitioners, is by creating "financial incentives" for operators not to carry indecent programming. The idea is that rather than incurring the costs associated with section 10(b)'s requirements, cable operators will opt for the less expensive alternative of simply banning indecent programming from leased access channels.[12] To support this prediction, petitioners quote a cable operator's comment to the Commission:

> Restricting indecent programming on leased access channels to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator. If operators are not permitted to recover these costs in full, they will be forced, as a practical matter, to

[11] Judge Wald would disregard *Blum* on the ground that the complaint there challenged the decisions of private actors, while the petition here challenges a federal statute and its implementing regulations. Dissent at 6-7. There is nothing to this. The private actors in *Blum* made their decisions pursuant to detailed state and federal regulations, *Blum*, 457 U.S. 993-95, and the Court evaluated the regulations to determine whether they dictated the private decisions at issue, *id.* at 1006-10.

[12] This argument could not supply state action with respect to section 10(c)'s authorization to operators to prohibit indecent programming on PEG channels. Section 10(b)'s segregation and blocking requirement applies to leased access channels only. We cannot imagine how that requirement could influence an operator's decision about allowing indecent programming on PEG channels.

adopt instead a policy prohibiting all such programming. The single channel requirement would thereby be converted into a *de facto* ban.

Comments of Continental Cablevisions, Inc., at 10 (Dec. 7, 1992). One notices immediately the significant condition in the comment — "If operators are not permitted to recover these costs in full . . . ." Nothing in section 10 specifies that the costs associated with segregation and blocking must be borne by cable operators, and the Commission has yet to consider the matter. The Commission has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation. First Report and Order, 8 F.C.C.R. 998, 1003 ¶ 32 n.29 (1993); *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 8 F.C.C.R. 5631, 5943 ¶ 502 n.1293 (1993). The situation might well be different if the Commission were to adopt a policy that created a significant economic disincentive for operators to segregate and block indecent programming.

Judge Wald, in her dissent, also predicts that because section 10(b)'s segregation-and-blocking arrangement is "technically and administratively cumbersome," operators will choose to ban indecent speech. Dissent at 8-9. Hence, there is "state action" with respect to section 10(a) and leased access channels.[13] We do

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[13] On this unfounded prediction, on this single assertion, rests the entirety of Judge Wald's reasoning that § 10(a) constitutes state action for leased access channels. But what of PEG access channels, where operators have discretion under § 10(c) to carry indecent programming without any segregation and blocking? Judge Wald, without the support of Chief Judge Edwards, or Judge Rogers, offers a different rationale for detecting state action in § 10(c) — that the provision is a "content-based regulation of protected speech." Dissent at 28. Of course that thoroughly begs the question. The First Amendment protects speech not from private interference but only from *governmental* restraints. One cannot say of § 10(c) that operators might be restricting "protected speech" until one first makes the threshold determination that the actions of the operators are (continued...)

not understand the "technically" part of this proposition. The comments of the National Cable Television Association, Inc., the principal trade association for the cable television industry, mentioned no technical difficulties in implementing section 10(b). And for good reason. Every cable system that has premium or pay-per-view channels already is constantly blocking and unblocking them and thus has the technical capability to perform this task. Perhaps there are smaller systems that do not have such channels. But the Commission took care of that difficulty in its First Order: it gave operators the choice of installing lockboxes (*see infra* p. 36) and retaining the key or numeric code until the customer requests unblocking. First Order and Report, 8 F.C.C.R. at 1009 n.46.[14] As to Judge Wald's point about "administrative" burdens, this is a matter of costs, of who should bear the financial burden of implementing section 10(b). As we have already mentioned, that question will be determined in future proceedings. In deciding this facial challenge to the regulations we are unwilling to speculate about the outcome of those proceedings. Still less are we willing to assume that the burden of implementing section 10(b) represents "such significant encouragement" (*Blum*, 457 U.S. at 1004) that the operators' choice must be deemed to be the choice of the government. The record, sparse as it is on this point, contains material pointing in the opposite direction.

Time Warner's request, which the Commission granted, to allow operators "to provide an additional blocked leased channel for

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[13](...continued)

attributable to the government. Otherwise, whenever cable operators make content-based choices not to carry particular programming on any channel, there would be state action because the speech is "protected" and because the governing statute does not force the operators to carry it.

[14] The Commission mentioned "technical" problems but these dealt with timing — that is, with how quickly operators could implement segregation and blocking. In order to avoid any such problems, the Commission allowed the operators 120 days to implement blocking mechanisms and procedures. First Order and Report, 8 F.C.C.R. at 1009. In this litigation the sufficiency of that time period is not challenged.

indecent programming if the first channel becomes full," is at odds with petitioners' and Judge Wald's prediction that the cost of implementing section 10(b) will force operators to ban indecent programming altogether. First Report and Order, 8 F.C.C.R. at 1009 ¶ 66. Even smaller cable systems were worried about their blocked leased access channels filling up, a concern that makes sense only if they anticipated carrying indecent programming. The burden was on petitioners, as the complaining parties, to show that because of section 10(b), the decisions of operators not to carry this material on leased access channels may be laid at the feet of the government. *Blum*, 457 U.S. at 1004; *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 547 n.29. And it is a burden they have not sustained.

Petitioners' third way of establishing state action relies on section 10(d) of the 1992 Act, the provision removing the civil and criminal immunity of cable operators for obscene programming carried on their access channels.[15] Section 10(d), they say, provides — in the words of *Blum*, 457 U.S. at 1004 — "such significant encouragement" to operators to bar indecent programming on access channels that their "choice must in law be deemed to be that of the" government. *Blum* itself rejected a similar argument. Although state regulations penalized nursing homes for failing to "discharge or transfer patients whose continued stay [was] inappropriate," the regulations did not themselves dictate the decision to discharge or transfer. *Id.* at 1009. Therefore, "penalties imposed for violating the regulations add[ed] nothing to [the patients'] claim of state action." *Id.* at 1010. The same logic applies here. Because obscenity is not constitutionally protected, Congress may prohibit its showing on access channels. *See, e.g.*,

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[15] Petitioners contend that section 10(d) is "particularly suspect" because it covers programming that merely "*involves* obscene material." Brief for Petitioners at 31 n.15 (italics added); *see supra* note 1. As petitioners acknowledge, however, the Commission's unchallenged interpretation of the statutory phrase is that operators lose immunity only for material that "is unprotected by the first amendment." First Report and Order, 8 F.C.C.R. at 1005 ¶ 44 n.40.

Sable Communications of California, Inc. v. FCC, 492 U.S. at 124. Nothing in section 10(a), section 10(b), or section 10(c) compels cable operators to refuse to carry indecent programming. The matter is left to their editorial discretion. With discretion comes responsibility. Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control. 47 U.S.C. § 558 (amended 1992). Under the 1992 Act, whenever an operator chooses to carry indecent programming on any channel, it does so against the backdrop of Congress's prohibition against obscenity on cable television. That a cable operator takes this into account in deciding which programs to carry — on any channel — does not convert its refusal to carry indecent programming into state action. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir.1987), *cert. denied*, 485 U.S. 1029 (1988).[16]

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[16] Three other courts of appeals have found no state action in comparable contexts. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir.1991), *cert. denied*, 112 S. Ct. 966 (1992); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991); *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir.1986). Acting pursuant to a federal statute, telephone companies furnishing billing services to dial-a-porn purveyors blocked their indecent messages until customers, in writing, specifically requested access. The purveyors challenged the statute as a prior restraint in violation of the First Amendment because it required them to classify their messages based on content. The Second and Ninth Circuits found no state action. *Dial Info. Servs. Corp.*, 938 F.2d at 1539, 1543; *Information Providers' Coalition*, 928 F.2d at 871, 877. Both courts of appeals ruled that because the government did not compel telephone companies to supply billing services to dial-a-porn purveyors — which is what triggered the statute's blocking and classification requirements — the telephone companies were not state actors and the First Amendment did not apply. *Dial Info. Servs. Corp.*, 938 F.2d at 1535; *Information Providers' Coalition*, 928 F.2d at 877. *In Carlin Communication, Inc.*, the Eleventh Circuit held there was no state action in a telephone company's decision not to offer sellers of sexually

(continued...)

Petitioners think that by calling leased access and PEG channels "public forums" they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech. But a "public forum," or even a "nonpublic forum," in First Amendment parlance is government property. It is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee. The Supreme Court uses the "public forum" designation, or lack thereof, to judge "restrictions that the government seeks to place on the use of its property." *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992) (italics added). State action is present because the property is the government's and the government is doing the restricting. In this line of cases, regulation of speech on government property traditionally used for public expression — streets and parks, for instance — gets the highest level of scrutiny. *Id.*; *Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 372 (D.C.Cir.1992). These are the typical "public forums." Regulation of government property opened for expressive activity, although not traditionally so used, gets the same First Amendment treatment. *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2705. "Nonpublic"

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[16](...continued)

explicit messages access to its prerecorded message service, even though a state regulatory agency studied the company's proposed policy, issued an order "strongly approving" the policy, and authorized a tariff amendment incorporating it. *Carlin Communication, Inc.*, 802 F.2d at 1358, 1359.

These decisions cannot be distinguished on the ground that with respect to cable television, operators must accept non-indecent access programming. What matters — in the dial-a-porn cases and in this one — is whether the government has so injected itself into the private actor's decision triggering federal regulation that the decision may, for purposes of constitutional analysis, be treated as the government's.

forums — nonpublic, that is, in the respect that the government has not opened its property to the public — are treated less stringently. *Id.* All of the Supreme Court's "public forum" cases fall into one of these three categories.[17] Access channels fall into none of them. As petitioners and everyone else knows, these channels are not government owned. The channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers.

Petitioners nevertheless insist that even private property may sometimes be considered a "public forum" for First Amendment analysis. For this proposition they rest upon the italicized portion

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[17] *See, e.g., International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. at 2703 (airports owned by Port Authority of New York and New Jersey); *United States v. Kokinda*, 497 U.S. 720, 723 (1990) (sidewalk belonging to post office); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 792 (1985) (fundraising campaign for federal employees established pursuant to executive order); *United States v. Grace*, 461 U.S. 171 (1983) (sidewalk in front of Supreme Court building); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1982) (school district's internal mail system); *Greer v. Spock*, 424 U.S. 828, 830 (1976) (United States Army post); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299 (1974) (advertising space on public rapid transit vehicles); *Adderley v. Florida*, 385 U.S. 39, 40 (1966) (premises of county jail). In *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 128, 131 (1981), which petitioners do not cite, the Court held that privately owned mailboxes are not "public forums" and sustained a federal law prohibiting anyone from placing unstamped mailable matter in them. In finding no "public forum," it is uncertain whether the Court meant that mailboxes are simply private property, as Justice Stevens thought in dissent, 453 U.S. at 152, or, however described, are not open to the public for the expression of ideas.

A list of Supreme Court opinions using the phrase "public forum" through the October 1983 Term is contained in Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Form Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221 n.15 (1984).

of the following statement in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985): "[a]lthough petitioner is correct that as an initial matter a speaker must seek access to public property or to *private property dedicated to public use* to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue." The forum in *Cornelius* was the Combined Federal Campaign, created and regulated by the government, and consisting of "an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees." 473 U.S. at 790, 801. The forum was not, in other words, what the Court described as "private property dedicated to public use." While the Court cited no examples of such private property, it may have been referring to the government function cases of *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976), *overruling Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-69 (1972), in which a similar formulation — the "doctrine of dedication of private property to public use" — made its Supreme Court debut. What makes the *Cornelius* dictum puzzling is that neither *Hudgens* nor *Lloyd* embraced any such doctrine. Far from it. In holding that private shopping centers may not be equated with public streets and parks for First Amendment purposes, *Hudgens* and *Lloyd* found the dedication-of-private-property-to-public-use notion "attenuated," "by no means" constitutionally required, and untenable.[18] *Hudgens*, 424 U.S. at 519; *Lloyd Corp. v. Tanner*, 407 U.S. at 569; *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-81 (1980).

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[18] *Hudgens* and *Lloyd* distinguished the company town case of *Marsh v. Alabama*, 326 U.S. 501 (1946), on the grounds that the private owner of the town assumed "all of the attributes of a state-created municipality," exercised "semi-official municipal functions as a delegate of the State," and performed "the full spectrum of municipal powers," *Hudgens*, 424 U.S. at 519 (quoting *Lloyd*, 407 U.S. at 569). None of the parties to this case even cite *Marsh*. The decision has no bearing on the issue before us for quite obvious reasons. Cable operators do not exercise municipal functions, let alone the "full spectrum" of municipal powers.

Given the holdings of *Hudgens* and *Lloyd*, the dictum in *Cornelius* cannot serve as a basis for resurrecting this rejected doctrine. And it cannot support a determination that cable access channels are so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system. In saying this, we recognize that unlike our examples of supermarket bulletin boards and private computer networks, the government — in the 1984 Act — compelled cable operators to provide leased access and, if the franchising authorities so demand, PEG access channels. This had the effect, as the Commission found in its First Report and Order in this case, 8 F.C.C.R. at 1001-02 ¶ 22, and as the Supreme Court had anticipated in *Midwest Video*, 440 U.S. at 701, of imposing "common-carrier obligations on cable operators." In the communications context, however, the fact that a regulated entity is a common carrier — that under certain circumstances it must provide communications facilities to those who desire access for their own purposes (440 U.S. at 701) — does not render the entity's facilities "public forums" in the First Amendment sense and does not transform the entity's discretionary carriage decisions into decisions of the government. *See Information Providers Coalition v. FCC*, 928 F.2d at 877; *Carlin Communications*, 827 F.2d at 1297; *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. at 133 (Scalia, J., concurring). A heavily regulated private carrier of electricity may cut off service without having its decision scrutinized as if it were a state decision, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 358-59, and a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government alone.

* * *

Because we find no state action here and because that essential element cannot be supplied by treating access channels as public forums, we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c).

III

We turn now to section 10(b) of the 1992 Act. The provision applies to cable operators who decide to carry indecent programming on leased access channels. As implemented by the Commission's regulations, section 10(b) directs these operators to segregate leased access programming "identified by program providers as indecent" on a particular leased channel (or channels, if more than one is needed) "available to subscribers only with their prior written consent . . . ." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(b)). Upon receipt of a subscriber's "written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old," the operator must make the programming available within thirty days. *Id.* Petitioners detect four constitutional infirmities in this scheme: (1) section 10(b) is not the least restrictive means of achieving the government's interest; (2) it impermissibly discriminates against indecent programming on leased access channels; (3) it constitutes an invalid prior restraint; and (4) it is unconstitutionally vague.

"All questions of government are ultimately questions of ends and means." *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (D.C.Cir.1993). So here. The end of section 10(b) is not in doubt — it is to "limit the access of children to indecent programming." Pub. L. No. 102-385, § 10(b), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(j)(1)). That the government has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards," is beyond dispute. *Sable*, 492 U.S. at 126. Since the First Amendment permits the government to achieve that aim so long as it uses the least restrictive means, *id.* at 126, the first question section 10(b) raises is whether its segregation and blocking requirements are such means.

In deciding this issue, it is essential to begin by comparing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), with *Sable*. In *Pacifica*, the Commission ruled that an afternoon radio broadcast

containing offensive, sexually explicit language violated a federal prohibition against indecent radio communications. *Pacifica*, 438 U.S. at 731-33. Underscoring the nature of radio broadcasting — its "uniquely pervasive presence" making protection of unwilling listeners by broadcasting prior warnings impossible, *id.* at 748, and its accessibility to children, *id.* at 749-50 — the Court held that the Commission could prohibit a radio program containing indecent words during times when there was a reasonable risk children would be in the audience, *id.* at 732, 750. Eleven years later, in its next encounter with federal regulation of media indecency, the Court struck down legislation totally banning indecent interstate commercial telephone messages. *Sable*, 492 U.S. at 117. *Sable* distinguished *Pacifica* on the bases that children do not have the same access to commercial telephone communications as they do to radio broadcasting, and that indecent telephone communications do not present the problem of surprising unwilling listeners. *Id.* at 127-28. The *Sable* Court found that the total ban on indecent commercial telephone communications limited "the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.[19] Given these considerations, the Court ruled there were less restrictive ways, short of a total ban, to accomplish the government's goal of protecting children from indecency. *Id.*

From *Pacifica* and *Sable*, we distill two principles applicable to this case. First, the constitutionality of indecency regulation in a given medium turns, in part, on the medium's characteristics. Second, in fashioning such regulation, the government must strive to accommodate at least two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material. As to the first, it is apparent that leased access programming has far more in common with the radio broadcast in *Pacifica* than with the telephone communication in *Sable*. Nearly fifty-six million households, more than sixty percent of all households with televisions, subscribe to cable service. H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 56 (1992). Most cable

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[19] That finding necessarily entails the proposition that there are conversations unsuitable for children to hear.

subscribers do not or cannot use antennas to receive broadcast television services. *Id.* at 57. Hence "[c]able television has become our Nation's dominant video distribution medium." S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991). The cable audience, like the radio broadcast audience, "constantly tun[es] in and out," so that prior warnings will not "completely protect the . . . viewer from unexpected program content." *Id.* Unlike services that subscribers affirmatively choose and pay for, such as dial-a-porn or cable pay-per-view and premium channels, leased access channels automatically come into all cable subscribers' homes. Indecent leased access programming thus hardly qualifies as an "invited guest," *see* Judge Wald, dissenting, at 21. A cable subscriber no more asks for such programming than did the offended listener in *Pacifica* who turned on his radio. Cable television now provides a vast amount of information in an easily accessible way. In this respect, it is similar to broadcasting. Consequently, it makes no sense to say that the First Amendment requires a household either to forego cable television altogether or risk exposure to indecency. For purposes of regulating indecency on those channels, we conclude that cable television is sufficiently pervasive and easily accessible to children to justify the government's attempts to regulate indecency on cable channels.

In light of the nature of leased access programming, does section 10(b) represent the least restrictive means of furthering the government's goal of protecting children from indecent programming? Petitioners say no, Congress could have accomplished what segregation and blocking achieve either by continuing to rely entirely on the 1984 Act's provision giving cable viewers the option of voluntarily blocking indecent programming, 47 U.S.C. § 544(d)(2)(A), or by confining indecent programming to late at night — a "safe harbor." We agree with the government that, given the pervasiveness of cable television and its accessibility to children, neither of these options would have achieved the government's aims. As to subscriber-initiated blocking, the Commission concluded that the type of programming with which section 10(b) is concerned presents special problems such a system does not solve. Leased access programming "may come from a

wide variety of independent sources, with no single editor controlling [its] selection and presentation," placing a cable viewer in risk of being intermittently and randomly confronted with patently offensive displays of sexual or excretory activities or organs. First Report and Order, 8 F.C.C.R. 998, 1000 ¶ 15 (1993). To prevent exposing children to such programming under a voluntary blocking system, cable viewers would have two, equally unacceptable options. Either they could continually activate and deactivate their lockboxes, inevitably risking a slip up or a lapse that would expose their children to indecency, or they could install lockboxes permanently, thereby giving up leased access programming altogether. *Id.* at 1000-01 ¶ 15; *cf. Dial Info. Servs.*, 938 F.2d at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn as . . . would [a] presubscription requirement"). Nor would a "safe harbor" period protect children from indecent programming as effectively as section 10(b)'s segregation and blocking requirements. Even during late hours, some unsupervised children will be watching cable television and thereby have access to indecent programming, a risk that section 10(b) eliminates. Not only do section 10(b)'s segregation and blocking requirements most effectively further the compelling interest in protecting children from indecent leased access programming, but also this provision minimally burdens those adults who wish to watch such material. In this respect, section 10(b) differs markedly from the regulations considered in *Pacifica* and *Sable*. In *Pacifica*, an adult could not tune into indecent broadcasting at times when "there [was] a reasonable risk that children [might] be in the audience," 438 U.S. at 732; and in *Sable*, an adult could never dial into indecent commercial telephone messages, 492 U.S. at 131. By contrast, section 10(b) provides that those adults desiring to watch indecent programs on the channel the operator has set aside can do so no later than thirty days from the date of their request. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(c)). In fact, segregation and blocking appear to accommodate the interests of those viewers who want indecent programming *better* than would a safe harbor system, under which

cable viewers would be confined to watching such programming during designated, often inconvenient time periods.

Given its effectiveness in limiting the exposure of children to indecent programming and its insignificant restriction of adults' access to such material, we conclude that section 10(b) passes the least restrictive means test.

Petitioners' second argument is that the segregation-and-blocking system unconstitutionally discriminates against programming on leased access channels. Section 10(b), according to petitioners, embodies "speaker-based discrimination" in violation of the First Amendment and the equal protection component of the Fifth Amendment because similar regulations do not apply to other types of channels. We find this idea tenuous. Section 10(b) no more singles out indecent leased access programming for regulation than did the 1984 Act, which petitioners tout as the epitome of constitutionality. *See infra* p. 14. They ignore entirely that a blocking system has been in place for all channels, and thus with respect to all "speakers" on cable television, since 1984. As we have mentioned, the 1984 Act, in "order to restrict the viewing of programming which is obscene or indecent," required cable operators to sell or lease requesting subscribers "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A). These devices, commonly known as lockboxes or "parental control devices," use a key or a numeric code to lock out certain channels. DANIEL L. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.09[3][c], at 6-98 (1994). Employing the devices, subscribers can "decide whether to block a channel and have the operator keep that channel out of their home by the flick of a switch." *Id.* Section 10(b) of the 1992 Act altered this system so that blocking on leased access channels carrying indecent programming is now

operator-initiated, with subscribers retaining the option of having the channel unblocked.[20]

From the perspective of those petitioners who show or wish to show indecent programs on these channels, the difference between the two systems amounts to this: under the 1984 Act, their material got into the home unless the subscriber locked it out; under the 1992 Act, their material does not get into the home unless the subscriber invites it in. Either way the programmers' products are available to those who want to watch them. Of course, there will always be subscribers disinclined to any action regardless of what system is in place. Before 1984, their television sets would receive the indecent programs shown on these channels; after 1992, they would not. But we see no reason why leased access programmers should necessarily retain the advantage of such inertia, and we can conceive of no constitutional principle entitling them to do so. Furthermore, there is little difference between section 10's treatment of indecent leased access programming and the 1992 Act's handling of pay-per-view programming. Under current regulations, pay-per-view programs are, in effect, blocked and segregated: as the "negative option billing" provision requires, a subscriber will not receive such programs unless he or she specifically so requests. 47 U.S.C. § 543(f) ("A cable operator shall not charge a subscriber for any service or equipment that the

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[20] Section 10(b)'s regulatory scheme parallels the one Congress imposed on the dial-a-porn industry. Under 47 U.S.C. § 223(c)(1), telephone subscribers can obtain access to obscene or indecent telephone messages only by making a written request to their telephone carriers. The Second and Ninth Circuits have rejected constitutional challenges to this statute. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir.1991), *cert. denied*, 112 S. Ct. 966 (1992); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991); *see supra* note 16.

subscriber has not affirmatively requested by name.'").[21] If that is constitutional, and it surely is, so is section 10(b).

We reach the same conclusion when we consider the matter from the perspective of those petitioners who are cable subscribers. For the purpose of this analysis, subscribers may be divided into two classes — those who do, and those who do not, want to receive indecent programming on leased access channels. Before the 1992 Act, viewers in the do-not-want category always had to take the initiative and to bear the expense of blocking indecent programming from their homes. It was up to them to request their cable operators to provide lockboxes to them, and they paid for the equipment. With the 1992 Act, it is the do-want class who must take the initiative: they are now the ones who have to make a request, in writing, for access to indecent programming.[22] Under both systems, adults who wish to receive this type of material receive it. Certainly, as to the 1984 Act's lockbox system, there can be no constitutional objection. If individuals do not want indecent material coming into their homes, they have every right to keep it out. Nothing in the Constitution gives cable operators and programmers the right to demand that subscribers watch whatever they produce. The corollary to the freedom to bring expressive material into the home is the freedom not to bring it in. By requiring lockboxes to be made available upon request, the 1984 Congress facilitated the freedom of viewers and thereby advanced

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[21] If the operator decides to offer a "premium channel" free of charge — that is a "pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R" the operator must give at least 30 days notice of the offering and block the channel at the subscriber's request. 47 U.S.C. § 544(d)(3).

[22] Viewers preferring "unimpeded, selective access to some but not all" indecent programming, *see* Judge Wald, dissenting, at 14, still have the option of requesting access to a blocked channel and installing a lockbox that enables them to block indecent programming they do not want their children to see. Judge Wald apparently agrees that lockboxes are effective means of restricting access to indecent programming. *See id.* at 23-25.

First Amendment values. It cannot make a constitutional difference that the 1992 Congress, through section 10(b), has also facilitated viewer preferences by shifting the burden of making a request from the do-not-want class to the do-want class of subscribers.[23]

To say, as petitioners do, that section 10(b) distinguishes between indecent speech and other types of speech, or that it singles out leased access channels from other cable channels, supplies only a description, not an analysis. Of course section 10(b) does what petitioners say, but it does so for a particular, and for a constitutionally permissible reason — to protect children and to enhance the ability of parents to shield their children from the influence of "adult" programming. *See Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968). The notion that Congress could not take

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[23] Petitioners do not contend that any stigma attaches to a subscriber requesting unblocking or that subscribers would otherwise be deterred from making a request. Playboy's pay-per-view channel, to which subscribers must also request access, apparently has a large audience. *See* Comments of New York Citizens Committee for Responsible Media, at 11 (Dec. 29, 1992). Moreover, the 1984 Act and the 1992 Act contain provisions protecting the privacy of subscribers in their dealings with cable operators. Pub.L. No. 102-385, § 20, 106 Stat. 1460, 1497-98 (1992) (codified at 47 U.S.C. §§ 551(a)(2), 551(c)(2)); Pub.L. No. 98-549, § 631, 98 Stat. 2779, 2794-95 (1984) (codified at 47 U.S.C. § 551). Although the parties do not mention the case, it is worth noting that for these reasons *Lamont v. Postmaster General*, 381 U.S. 301 (1965), is distinguishable. The Supreme Court there struck down a statute directing the Post Office to detain mail containing "communist political propaganda" and to deliver it only upon the addressee's affirmative request. *Id.* at 302, 307. The law set federal officials "astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail," *id.* at 306, and the Court rested its decision on the "narrow ground" that this would deter persons from requesting such mail because they "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason," *id.* at 307. It is not the federal government, but private cable operators, who receive the unblocking requests, and federal law forbids the operators from revealing what choice any particular subscriber has made.

one step in this direction without imposing section 10(b)-like requirements on all cable channels is not only untenable (*see United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993)), but also inconsistent with the least restrictive means test we have just discussed. That constitutional principle confines the scope of the solution to the extent of the problem. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 511-12 (1991). To repeat what we wrote earlier, leased access programming comes from a wide variety of sources; no single entity controls its selection and presentation; no single editor is responsible for what is shown. What will appear on these channels, and when, is anyone's guess. Without segregation and blocking, cable viewers risk subjecting themselves and their children to sporadic encounters with patently offensive displays of sexual or excretory activities or organs. First Report and Order, 8 F.C.C.R. 998, 1000 ¶ 15 (1993). Only PEG access channels are comparable. But they did not pose dangers on the order of magnitude of those identified on leased access channels, and Congress knew that if this situation changed, local franchising authorities could respond by issuing "rules and procedures" or other "requirements" pursuant to the 1984 Act, 47 U.S.C. § 531(a) & (b), or by eliminating PEG access channels altogether, 47 U.S.C. § 531(a). If Congress nevertheless had stretched section 10(b) to cover other cable channels, if it had not concentrated only on leased access channels, it could have been charged with having regulated more extensively than necessary. While there undoubtedly is indecent programming on other cable channels,[24] the Commission found that cable

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[24] Operators have the power to impose a segregation and blocking system on the vast majority of their non-access channels, because their editorial control over such channels is unfettered by federal regulation. The only exception is for those channels they must set aside for local broadcasting to fulfill their "must-carry obligations." *See generally* 47 U.S.C. §§ 534, 535; *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994). Broadcasting, however, is regulated under a separate statutory scheme limiting indecent programming to the late evening hours. *See generally Action for Children's Television v. FCC*, 11 F.3d 170 (D.C.Cir. 1993), (continued...)

operators generally provide it through "per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." First Report and Order, 8 F.C.C.R. at 1001 ¶ 19 n.20. Indeed, petitioners' examples of indecency on other nonleased access channels — the Playboy Channel and "Real Sex" on HBO — fall into this category. In short, there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem, and there are constitutional doctrines, such as narrow tailoring and least restrictive means, that may have constrained it from going further than necessary.

Petitioners' two remaining contentions regarding section 10(b) merit only brief discussion. That the Commission's regulations give a cable operator up to thirty days to comply with a subscriber's request to unblock a leased access channel does not entail a "prior restraint" in violation of the First Amendment.[25] *Implementation*

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[24](...continued)

reh'g in banc granted, 15 F.3d 186 (D.C. Cir. 1994). As to PEG access channels, section 10(c) of the 1992 Act gives cable operators "broad discretion" to decide how to treat indecent programming carried there, and may if they choose impose a blocking system. Second Report and Order, 8 F.C.C.R. 2638, 2641 ¶ 19. According to the Commission, Brief for the Commission at 45, operators are not prohibited from imposing a segregation and blocking system for PEG channels. *See* First Report and Order, 8 F.C.C.R. at 1005 ¶ 43 n.39. Thus, under section 10(b) operators are *required* to segregate and block indecent programming carried on leased access channels, while they are generally *permitted* to do so on other channels.

[25] Petitioners also contend that § 10 as a whole constitutes a prior restraint because cable operators are "pressured to censor" indecent programming according to a regulatory scheme that "dictates the contours of this censorship." Although framed in different terms, this argument is essentially identical to petitioners' claim regarding state action, which we discussed and rejected. *See supra* pp. 10-27. We reiterate that cable operators who decide to prohibit indecent programming on access channels are not state actors. Consequently, their banning of such material cannot (continued...)

of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(c)). A prior restraint is an administrative or judicial order restraining future speech. *See, e.g., Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C. Cir.1992). Yet nothing in section 10(b) forbids speakers from speaking. *Compare Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 (1980); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975). The offerings of leased access programmers will air. Subscribers wishing to see indecent speech may not have their wishes fulfilled instantaneously,[26] just as new subscribers to cable television may have to wait for their services to be hooked up. The latter is not a prior restraint, and neither is the former. *See Dial Info. Servs. Corp.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 878. The government is neither prohibiting indecent programming in advance, nor requiring anyone to obtain the government's stamp of approval before a program airs.

Petitioners' remaining argument is that section 10(b) is impermissibly vague because leased access programmers must identify for cable operators which of their programs are indecent. Programmers thus must "worry about what a cable operator may 'reasonably believe' to be indecent." Brief for Petitioners at 46. The Commission's definition of indecent programming essentially tracks the definition of broadcast indecency this court reviewed in *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507-08 (D.C. Cir.1991), *cert. denied*, 112 S. Ct. 1282 (1992) (*ACT II*). *Compare Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993

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[25](...continued)

constitute a prior restraint. *Cf. Dial Info. Servs.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 877.

[26] The FCC determined that a written request, rather than a telephonic one, was necessary to enable a cable operator to ascertain that the requestor is over eighteen years old. First Report and Order, 8 F.C.C.R. at 1009 ¶ 67.

(1993) (to be codified at 47 C.F.R. § 76.701(g)). In *ACT II*, 932 F.2d at 1507-08, and in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (*ACT I*), we held that the Supreme Court's *Pacifica* decision foreclosed the question whether this definition of indecency was unconstitutionally vague: "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *ACT I*, 852 F.2d at 1339. No intervening Supreme Court decision affects our determination. There is nothing to petitioners' lament that access programmers will have trouble discerning what cable operators consider indecent. Since the Commission will resolve any conflicts between a programmer and an operator on this issue, First Report and Order, 8 F.C.C.R. at 1010 ¶ 75, programmers must ultimately concern themselves with potential *Commission* determinations regarding indecency. In this respect, they are in precisely the same situation as the petitioners in *ACT I* and *ACT II*.

* * *

Section 10(b)'s segregation and blocking requirements satisfy the least restrictive means test; do not impermissibly single out leased access programming for regulation; do not constitute a prior restraint on speech; and are not, because of the definition of indecency, unconstitutionally vague.

The petitions for review are denied.

WALD, *Circuit Judge*, with whom TATEL, *Circuit Judge*, and, with respect to Parts II and III, ROGERS, *Circuit Judge*, join, dissenting: Lurid descriptions of programming that may well cross over the line into obscenity and merit no First Amendment protection at all should not obscure what this case really is about. *See* Majority opinion ("Maj. op.") at 19-20. This case is *not* about obscenity; it concerns significant restrictions on a class of speech that is unquestionably entitled to constitutional protection, although possibly offensive to some audiences. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Under the broad definition of "indecency" used in this regulation, affected speech could include programs on the AIDS epidemic, abortion, childbirth, or practically any aspect of human sexuality.[1]

The Denver Area Educational Television Consortium's critically-acclaimed program The 90's Channel, transmitted on the leased access channels of eight cable systems, serving 500,000 customers, provides information and opinion on a broad range of subjects in a self-described "unvarnished" cinema-verite style. The 90's Channel has on occasion included segments on how to do a self-help gynecological exam, a documentary on the controversial

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[1] The regulations define "indecent" programming as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993). The definition thus extends to any programming that includes "patently offensive" verbal descriptions or visual depictions of sexual or excretory activities, regardless of the literary, artistic, political, or scientific merit of the work as a whole. The regulations require leased access programmers to self-certify whether their work is "indecent" under this definition, at the risk of being barred from televising future work if they err in that judgment. *First Report and Order*, 8 F.C.C.R. 998, 1005 ¶ 43, 1007 ¶ 51, 1010 ¶ 75 (1993). That the regulations will likely result in overdeterrence by risk-averse programmers seeking to avoid the professional "death penalty" imposed for certification errors seems quite apparent. The result will inevitably be an extremely broad class of programming silenced by the regulations.

Robert Mapplethorpe art exhibit, and a traditional fertility festival in Japan featuring a procession of marchers carrying images of human genitalia. Each of these programs included descriptions or depictions of sexual activities or organs that might well be considered "patently offensive" as measured by contemporary community standards. Self-applying the FCC's definition of "indecency," then, it is not at all improbable that a cable operator might declare all these programs "indecent," and find itself required under the regulations either to ban or to block them.

"Indecency" is not confined merely to material that borders on obscenity — "obscenity lite." Unlike obscenity, indecent material includes literarily, artistically, scientifically, and politically meritorious material. Indeed, by definition, it includes all "patently offensive" material that has any of these kinds of merit, and cannot be branded as obscene under the standard established by the Supreme Court in *Miller v. California*, 413 U.S. 15, 24 (1973). In many instances, the programming's very merit will be inseparable from its seminal "offensiveness." A bowdlerized documentary on the Mapplethorpe exhibit which did not include some description or depiction of Mapplethorpe's sexually explicit photographs themselves, for example, would hardly be an informative statement on the artistic and political debate the exhibit engendered. Yet the very act of including such powerful visual or audio images, which to many viewers are "patently offensive," would court an "indecency" citation by the FCC if the cable operator did not pull the plug or consign the program to a blocked channel. It is these kinds of portentous decisions about art, politics, science and "indecency" which are implicated in this case.

While we accept that the government may have a compelling interest in protecting children from indecent programming, we agree with Judge Edwards that that interest must be pursued in the context of helping parents to make viewing choices for their

children as to the programming they watch inside the home.[2] Additionally we note that producers of such programming also have a constitutional right against unnecessary governmentally-induced restrictions on their right to disseminate programs to willing adults. The legal issue devolves into one of whether the FCC's "indecency" regulations unduly burden the First Amendment rights of speakers and adult listeners on access channels of privately-owned cable systems. Before turning to this complicated question, however, we must satisfy ourselves that state action is present in Congress' statutory scheme.

I. State Action Is Involved in Sections 10(a) and (b)

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech . . . ." Our state action analysis begins with the law that Congress has made in this case. Sections 10(a) and (b) of the 1992 Cable Act impose a disjunctive scheme regulating indecent speech. In tandem, they require that cable operators either ban or block "indecent" speech on leased access cable channels. The majority insists, however, that § 10(a) is exempt from constitutional scrutiny because it involves no state-imposed burden on speech. Instead, they say, § 10(a) merely restores to cable operators the "editorial control" taken away from them in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Act"), which mandated the creation of publicly accessible leased channels and forbade operators from controlling the content of programs on those channels. Maj.

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[2] We note that the Supreme Court has never actually passed on the FCC's broad definition of "indecency." *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (acknowledging that in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court never specifically addressed whether the FCC's generic definition of indecency was unconstitutionally vague, but arguing that because the Court "implicitly" approved the definition by relying on it, lower courts are barred from addressing the vagueness issue on the merits).

op. at 15. In fact, § 10(a) does not restore any genuine editorial control to cable operators over indecent material. Instead § 10 insists that a cable operator either ban a governmentally-defined category of "indecent" speech outright or, if it declines, relegate it to a separate channel and block *all* households from receiving that channel unless they specifically request it in writing up to 30 days in advance. Sections 10(a) and (b) are co-dependent parts of one statutory scheme regulating speech. They present cable operators with an "either-or" command: accentuate the positive by banning indecent leased access programming under § 10(a), or eliminate the negative by blocking it under § 10(b). There is no "Mr. In-between." The operator can no longer in close cases let the program air on a regular leased access channel, or televise it at a later hour when fewer children are watching, as he might on a regular commercial channel. Clearly, §§ 10(a) and (b) are inseparable parts of an integrated statutory regime that aims out front to curtail cable transmission of indecent speech, and affords cable operators only the most limited choice as to how to achieve that end.

The purpose and effect of §§ 10(a) and (b) are clear enough. As their chief congressional sponsor explained, they "*forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels." 138 Cong. Rec. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms) (emphasis added). That forthright statement would ordinarily end the state action inquiry. When Congress passes a statute whose avowed purpose, and effect, is to *forbid* or severely restrict communication of a certain category of speech defined by content, state action is usually conceded. *Cf., e.g., Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (congressional enactment may have differential effect on some categories of speech, so long as the statute is not "intended to suppress" a content-defined category of speech).

The majority argues, however, that because § 10(a) is couched in permissive language, not explicitly *requiring* the operator to ban indecent speech, there is no state action. Maj. op. at 12. But in effect, § 10 says "an operator *may* ban, or in the alternative *must*

block." To illustrate the effect of the "may" language of § 10(a) when used in the context of § 10(b), we point out that the operator's options — and the burden on speech — would be no different if the regulation were expressed in any of the following terms:

1. "an operator *must* ban, or in the alternative *must* block";

2. "an operator *may* block, or in the alternative *must* ban"; or

3. "an operator *may* ban, or in the alternative *may* block, but these alternatives are to the exclusion of all others."

All these formulations, linguistically distinct, are logically and functionally equivalent. Each *commands* that the cable operator *either* ban *or* block indecent speech. Yet the §§ 10(a) and (b) option is no different in its effect. Only empty formalism would elevate Congress' choice of the nominally permissive "may" language of § 10(a) to demonstrate the absence of state action, when § 10(b) lurks in the shadows, ready to pounce.[3]

Senator Helms's statements in floor debate that § 10 merely restores editorial control to cable operators do not do much to bolster the government's anti-state action argument. *See* 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms) ("this is not governmental action" but "action taken by a private party"); *id.* at S649 (statement of Sen. Helms) (in colloquy, responding affirmatively to the statement, "So this is not Government censorship"). In light of Sen. Helms's earlier statement that the purpose of § 10 was to "forbid" cable operators from transmitting indecent programming, these later statements

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[3] Although the majority does not say so expressly, its analysis of § 10(b) as the "least restrictive means" for protecting children presumes that state action is implicated. Yet, if § 10(a) does not implicate state action, it is difficult to see why § 10(b) does either, since the cable operator is no more *required* to segregate-and-block indecent programming under § 10(b) than it is to ban indecent programming under § 10(a). In either case, the operator can avoid one provision entirely by "voluntarily" electing to submit to the *other* provision.

suggest only a belated awareness of the section's constitutional infirmities, and an attempt to put a gloss on the directive. But an unconstitutional sow's ear cannot be so easily converted into a constitutional silk purse.

The majority concedes that if the cable operator's decision to ban indecent programming under § 10(a) is state action, the regulation is a form of state censorship and cannot survive First Amendment scrutiny. Maj. op. at 11. But they go on to cite *Blum v. Yaretsky*, 457 U.S. 991 (1982), for the proposition that the cable operator's decision to ban indecent programming under § 10(a), however constrained, is *not* state action, but rather the action of a private party without a sufficiently close "nexus" to the government so that the state may be held responsible for his actions. Under *Blum*, the state can be held responsible for a private decision only if the state exercises coercive power on the private actor, provides "significant encouragement" for the decision, or transfers into private hands powers traditionally exercised by the state. *Id.* at 1004-05. Here, the majority contends, none of those criteria is met.

I do not think this case fits the *Blum* model. As *Blum* itself instructs, "[f]aithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Id.* at 1003. In *Blum*, nursing home patients challenged decisions by private physicians and nursing home administrators — based on "medical judgments . . . according to professional standards that are not established by the State," *id.* at 1008 — to discharge or transfer them without procedural safeguards. The *Blum* complainants sought to hold those private decisionmakers to due process standards applicable to state actors; they did "not challeng[e] particular state regulations or procedures . . . ." on due process grounds. *Id.* at 1003. Here, in contrast, petitioners do not seek to apply First Amendment standards to the "actions taken by cable operators with respect to indecent programming," Maj. op. at 11. Instead, they mount a direct facial challenge to a federal statute and implementing regulations which have the avowed purpose and effect of restricting communication of a content-defined class of constitutionally-protected speech. The

majority's *Blum* analysis thus asks, and answers, the wrong question. The core question here is not whether the cable operators' private decisions implicate state action; whatever the answer to that question, we have state action in the government's own ban-or-block scheme, which is what is at issue here.[4]

As the Supreme Court explained in *Lugar v. Edmondson Oil Co., Inc.* — decided the same day as *Blum* — the point of the state action inquiry is to determine whether "the conduct allegedly causing the deprivation of a federal right . . . [is] fairly attributable to the state." 457 U.S. 922, 937 (1982). To answer that question, we ask first whether the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct

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[4] The confusion may stem from the way the argument was posed and addressed in the original panel opinion. There, the government conceded that if cable operators' decisions to ban indecent programming under §§ 10(a) and 10(c) *were* state action, the statute would impose a constitutionally impermissible censorship regime. *Alliance for Community Media v. FCC*, 10 F.3d 812, 820 n.9 (D.C.Cir.1993), *vacated*, 15 F.3d 186 (1994). The panel held that cable operators' decisions were indeed state action. *Id.* at 818-22. The majority rejects that conclusion. But the majority's next move is a *nonsequitur*: it simply does not follow that, if the cable operators' decisions are *not* state action, then the statute itself is not state action, and is exempt from constitutional scrutiny. Indeed, it strikes me as a wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action. The majority might better have argued that although the statute itself is plainly state action, it effects no abridgement of freedom of speech because it does nothing more than restore editorial control to cable operators. In that regard, they might have a stronger argument if the statute withdrew governmental restrictions on cable operators' control over leased and PEG access channels evenhandedly and across the board, without itself imposing differential regulations discriminating (as this statute does) on the basis of content in order to suppress a particular content-defined category of speech. *See infra*, Part IV.A. But instead of pursuing that line of reasoning, the majority would immunize the *statute itself* from constitutional scrutiny on grounds that cable operators' decisions under §§ 10(a) and 10(c) are not state action.

imposed by the State or by a person for whom the State is responsible"; and second, whether the "party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor." *Id.* Here, the deprivation of First Amendment rights is "caused by . . . a rule of conduct imposed by the State" — the rule requiring cable operators to ban or block a category of programming.[5] And the parties "charged with the deprivation," Congress and the FCC, are clearly "state actors."

Even if *Blum* did provide a legal analogy, which it does not, the factual record places it a galaxy apart. There is pressure in this scheme to push cable operators to ban indecent programming outright. Statements in the agency record by cable operators say that they view the § 10(b) segregation- and-blocking arrangement to be so technically and administratively cumbersome as to render it highly unattractive and indeed for many "unworkable." Joint Appendix ("J.A.") 195-97, 200, 253. *See also First Report and Order*, 8 F.C.C.R. at 1009, ¶ 69 (acknowledging technical and administrative burdens of blocking scheme).[6]

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[5] As Justice White explained in his concurrence in *Blum*, the private parties' decisions there were not based on any rule imposed by the state. 457 U.S. at 843 (White, J., concurring).

[6] The Commission noted that "the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems" and "may require considerable adjustments . . . in terms of rearranging existing services . . . ." *First Report and Order*, 8 F.C.C.R. at 1009 ¶ 69. *See also* J.A. 253 (comments of Time Warner Entertainment Company, noting "technological problems" faced by nonaddressable systems). "In addition, the new regulations will require cable operators to establish new procedures for subscriber notification . . . and for the processing of requests of leased access users and of subscriber requests for this channel, etc." 8 F.C.C.R. at 1009 ¶ 69. Finally, the Commission noted the special difficulties faced by "systems that require trapping devices to circumscribe access to these services." *Id.* Some "trapping" technology would require the operator to send out employees to place signal-interdicting "traps" at each subscribing household, and to remove them when the subscriber requested the blocked service. *See* J.A.

(continued...)

In addition, as the majority itself concedes, Maj. op. at 23-24, the Commission has yet to decide who will absorb the potentially high cost of the § 10(b) segregation-and-blocking scheme. If the cost falls on cable operators, as it presumptively must at least temporarily until the Commission authorizes a shift to subscribers or lessees, operators have a strong financial incentive, as well, to ban rather than block. *See* J.A. 200-01 (comments of Community Antenna Television Association, Inc.). Somewhat puzzlingly, the majority argues that because the Commission has not yet decided whether to allow cable operators to shift these costs, we do not know if operators will have a financial incentive to ban rather than block, and therefore petitioners have not met their burden of showing state action. Maj. op. at 23-24. That seems to me a notion at odds with our traditional constitutional test for state action. Surely the agency's delay in stating who will ultimately bear the financial burden of its scheme cannot postpone constitutional review indefinitely, once the scheme is in operation. And clearly the *present* regulations do not authorize operators to shift the costs of segregation-and-blocking to subscribers or lessees. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 F.C.C.R. 5631 ¶¶ 506, 516-20 (1993) (Commission sets maximum rates operators may charge lessees, based on annual calculation of "implicit fee" paid by nonaffiliated commercial programmers, with no provision for cost-based adjustments). Until the Commission takes affirmative measures to allow cost-shifting, any operator

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[6](...continued)

244 (comments of National Cable Television Association, Inc.). Nor are the incentives created by these complexities simply a matter of whether the costs are recoverable. Even if cable operators were allowed to recover their costs under the § 10(b) blocking scheme, cancelling out its cost disadvantages, opting for the § 10(b) blocking scheme would still require the cable operator in many cases to hire, train and supervise additional personnel, invest in new equipment, and develop and implement additional recordkeeping procedures. *See* J.A. 200. Sound management principles suggest that if either alternative would produce the same net revenue, the less technically and administratively complex option would be preferred.

undertaking segregation-and-blocking under § 10(b) bears the expense without any promise of recoupment. He therefore has a financial incentive to ban rather than block.

On the basis of the combined technical, administrative, and financial burdens imposed on cable operators under § 10(b), I have no difficulty even under a *Blum*-type rationale in concluding that the § 10 regulatory scheme "significantly encourages" them to ban indecent speech, thereby converting the cable operator's decision to ban under § 10(a) into state action.[7]

In sum, §§ 10(a) and (b) in tandem constitute state action.[8]

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[7] For the reasons detailed in Part IV.B. *infra*, I believe § 10(a) would be constitutionally impermissible even if it stood alone -- which, of course, it does not. Given the structure of the statutory provisions affecting leased access programming, and their avowed purpose to "*forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms), I do not think § 10(a) is severable from § 10(b). The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis in original). If we were to strike down § 10(b) and leave §10(a), cable operators would be left with discretion whether to "inflict[ ] their unsuspecting subscribers with sexually explicit programs," flatly contradicting the stated purpose of the provisions.

[8] The majority also rejects petitioners' alternative argument, that because leased and public access channels are a "public forum" for purposes of First Amendment analysis, the government may not authorize private parties to censor speech there. It is a close question. While the legislative history of the 1984 Cable Act uses the term "public forum" in describing leased and public access channels, admittedly there is no clear indication that Congress was using that term in its technical First Amendment sense, classifying cable access channels with such traditional public fora as parks and streets. However, I disagree with the majority's suggestion that a public forum can *never* exist on private property. *See* Maj. op. at 28-31. In some circumstances private property dedicated to public uses could become a limited public forum, through some

(continued...)

II. Sections 10(a) and (b) Cause A Deprivation of First Amendment Speech Rights

The majority relies on the untenable notion that requiring adults to separately request "indecent" leased access programming in writing, wait up to 30 days to receive such service, and possibly be required to pay extra for it, poses no burden whatsoever on the speech rights of either the speakers or receivers of such speech. *See* Maj. op. at 37-38. This does not square with reality. If the government imposed similar restrictions on other categories of speech, such as speech concerning nuclear power or criticism of government officials, and required that citizens could receive it only after separately requesting it in writing and then waiting up to 30 days to receive it, we would almost surely say that the speech rights of both speakers and listeners were unduly burdened. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Supreme Court struck down a statute providing that the Post Office deliver "communist propaganda" only upon written request in advance from the recipient. The Court ruled "on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered," *id.* at 307, and thus the recipient "carries an affirmative obligation which we do not think the Government may

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[8](...continued)

combination of legally binding use restrictions and an established tradition of use for speech purposes. A land swap, zoning approval, or building permits, for example, might be made conditional on a private property owner's agreement to permanently set aside part of his property for public access and use, including traditional First Amendment speech activities, either to substitute for or to supplement "traditional" public fora like parks and streets. Such use restrictions, perhaps in combination with a tradition of actual use for such speech purposes, might create a public forum. Similarly, Congress might create a public forum by insisting that privately owned communications media dedicate a portion of their capacity to unrestricted public access for speech purposes. Nonetheless, I would not reach the question of whether Congress created a public forum in this case because I find state action present in the statutory scheme itself.

impose on him." *Id.*[9] Advance notice and registration requirements "drastically burden free speech" because they "stifle" the spontaneity and immediacy of expressive activities and "chill[ ] . . . the exercise of first amendment rights." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir.1981) (striking down requirement that speakers wishing to exercise First Amendment rights in port facilities must register in writing at least one business day in advance). Our concern in such cases is that, by singling out a disfavored class of speech and requiring that audiences take special, affirmative steps to receive it, the government effectively blocks many potential listeners from hearing it, and impairs many speakers from providing it. These results are "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are

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[9] Attempting to distinguish *Lamont*, the majority misstates the "narrow ground" upon which the Supreme Court relied. *See* Maj. op. at 38 n.23. The passage more fully reads:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him.

Lamont, 381 U.S. at 307. The Court then discussed the requirement's "deterrent effect," noting that some vulnerable government employees would fear for their livelihoods if they requested forbidden literature. But "[a]part from them, *any* addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Id.* (emphasis added). *Lamont*, then, says such requirements burden speech in two ways: first by placing an "affirmative obligation" on the recipient, and second by branding the speech with government disapproval. *See also id.* at 309 (Brennan, J., concurring) (rejecting government's argument that the requirement is "only inconvenience and not an abridgement," because "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government").

contemplated by the First Amendment." *Lamont*, 381 U.S. at 307 (citation omitted).

In the first place, such disparate treatment clearly implies governmental disapproval of the speech in question, and it is beyond cavil that some stigma attaches to a written request to receive it. *Cf. Lamont*, 381 U.S. at 307 (placing affirmative duty on recipient of content-defined speech "is almost certain to have a deterrent effect" because the recipient "is likely to feel some inhibition in sending for literature which government officials have condemned . . . ."); *Rosen*, 641 F.2d at 1251 ("Identification requirements impose heavy burdens on the exercise of first amendment rights" because stigma and fear of reprisals will deter many from engaging in disfavored speech activities.).

More importantly, as the majority itself implicitly recognizes, only those who identify themselves as having a compelling interest in receiving the segregated category of speech are likely to take the special affirmative steps necessary to receive it. *See* Maj. op. at 37-38. Others with a milder level of interest or a lesser commitment to challenging the government's disapproval may lack the boldness to step forward and request it, or the initiative to take the affirmative steps necessary to gain access to the sealed-off information. Some may never even become aware that the speech may be received upon special request. Almost certainly fewer people will ultimately hear such speech. And under the new economic realities of a diminished market for their product as a result of governmental intervention, potential producers of such controversial speech will be disinclined to create it. Thus can government-imposed access barriers effectively squelch constitutionally-protected speech.

Yet the majority insists that so long as those who want access to a content-based class of speech *ultimately* may receive it, the government may, without constitutional consequence, freely place obstacles in the way of their receiving it. As a general proposition, this is surely inconsistent with our constitutional traditions of free speech and the unimpeded flow of ideas. We would not so easily tolerate such direct governmental interference with other categories of speech. *Cf. Lamont*, 381 U.S. at 307; *Rosen*, 641 F.2d at 1252.

One suspects that, *sub silentio*, the majority is leaning on a judgment that "indecent" speech is entitled to such a lesser degree of protection than other constitutionally-protected categories of speech that the same rigorous standards of constitutional testing do not apply.

Finally, the majority's arguments are fundamentally inconsistent with the realities of television viewing. The market for "indecent" speech does not break down neatly, as the majority suggests, into self-identified groups of those who want indecent speech in their homes, and those who do not. *See* Maj. op. at 38. Many viewers fall somewhere in between. They may not want a steady stream of "indecent" speech, and probably do not want to be perceived (even by their cable operator, much less anyone who might later acquire such information by subpoena or otherwise) as the kind of people who do. They therefore will not affirmatively write for access to the "indecent" channel even if they become aware of it. Yet given a free choice in the matter, they might prefer to have unimpeded, selective access to some but not all programs that fall within that broad umbrella designation. Not only *aficionados* of the arts or of politics but also the mildly curious might well decide to watch an "unvarnished" documentary on the Mapplethorpe exhibit if it is readily available, for example, but may not write to request an entire channel of indecency on the chance that this and similar programs will be included. They may want to shield their children from most "indecent" programming, yet may occasionally find it appropriate to expose older children to frank, even graphic discussions of sexuality and the AIDS epidemic, including some programs that might fall within the FCC's definition of "indecency" (or at any rate are close enough to the line that cable operators will ban them altogether or relegate them to the "indecent" channel). Whether they are "channel surfers" who like to browse before settling on a program, or "appointment viewers" who prefer to study a program guide and watch pre-selected programs, this regulation makes it substantially *more* difficult for cable subscribers to selectively control the content of their viewing on a program-by-program basis. It thus places a substantial burden on their speech rights as adult television viewers, while adding nothing

to their ability to exercise *selective* control over their children's viewing. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994). So too, when it comes to umpiring the "decency" of the communications permitted into our homes, the government's role should be restricted to one which supports not replaces society's primary institution for moral education — the family.

III. Sections 10(a) and (b) Do Not Meet the "Least Restrictive Means" Test

A. *What Does the Test Require?*

"Content-based regulations [of speech] are presumptively invalid," *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992), and are "subject . . . to the most exacting scrutiny," *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quotation and citation omitted). The Supreme Court has reiterated many times that a content-based regulation of speech must be "the least restrictive means" to achieve a compelling governmental interest. *Sable*, 492 U.S. at 126. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* To survive strict scrutiny, then, a content-based regulation must be "precisely drawn" to serve a compelling state interest. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

Supreme Court precedent certainly rejects the notion that a content-based regulation of speech will survive regardless of the burden on speech simply because it is the most effective means to achieve a compelling state interest. Quite the opposite. In *Sable*, for example, the government argued that a *total* ban on telephone transmission of indecent speech was the *most* effective, indeed the *only* fully effective way to achieve the government's compelling objective of protecting children. 492 U.S. at 128. Yet the Supreme Court decisively rejected that argument, conceding that

means other than a total ban might be *less* effective.[10] The Court said that a flat ban on indecent speech was not "the least restrictive means to further the articulated interest," *id.* at 126, because its "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages," *id.* at 131, and thus the challenged regulation was not sufficiently "carefully tailored." *Id.* at 126. As *Sable* demonstrates, a regulation can be the *most* effective means of achieving a compelling interest and still run afoul of the First Amendment if it burdens substantial amounts of protected speech beyond what would be reasonably effective in serving the compelling interest. Here, too, as in *Sable*, the precision demanded of a content-based regulation is decidedly missing.

B. *What Are the Compelling Interests?*

1. *Protecting Children*

The government asserts a compelling interest in "shielding minors from the harmful effects of indecent programming" entering their homes on cable television. Government Brief at 37. *See also Sable*, 492 U.S. at 126 (government has a compelling interest in "protecting the physical and psychological well-being of minors" which "extends to shielding minors from the influence of literature that is not obscene by adult standards"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978). The exact nature of that interest, however, is left unclear in both the government's brief and the majority's opinion. The majority argues somewhat inconsistently that the statute and regulations are aimed at assisting

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[10] The Court said that while technological means of protecting children from indecent telephone messages might not be "fail-safe" or "foolproof," 492 U.S. at 130 & n.10, nonetheless there was nothing in the record to establish that they would not be "extremely effective." *Id.* at 130. Thus while the Court required that such alternative, less restrictive means be "effective," it did not require that they be shown to be equally as effective as a total ban.

parents in protecting children from indecent speech; and that because parents are not doing an adequate job of supervising their offsprings' viewing, the government must do it for them by keeping indecent programs out of reach. *See* Maj. op. at 39 (citing both rationales but treating them as one). While not inescapably irreconcilable, these goals are often in tension.

If the justification for the ban-or-block scheme is that it will assist parents in monitoring their children's viewing, § 10 is certainly not precisely crafted to do that job. Rather than enhance parental control, it merely deprives all adults as well as children of *any* choice if their cable operator exercises regulatory option (a) and bans indecent programming. Alternatively, if the cable operator does not ban indecent programming altogether, adult viewers are left with a single blanket choice under § 10(b), whether to affirmatively invite the complete repertoire of the "indecent" channel into their home (and perhaps to pay for it). They may either keep *all* indecent leased access speech out of their homes, or let *all* indecent programming in, thereby providing their children with unimpeded access to such programming.[11] Of what help to parents is that?

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court struck down a statute prohibiting advertisers from mailing unsolicited advertisements for contraceptives to home addresses, on grounds that the ban was not precisely drawn to achieve the government's interest. Although the government argued the statute was designed to "aid[ ] parents' efforts to discuss birth control with their children," the Court said the statute "provides only the most limited incremental support for the interest asserted." *Id.* at 73. While broadly burdening *all* adults by making it more difficult for them to gain access to a constitutionally-protected category of speech, the statute aided only one narrow class of

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[11] Parents who elect to receive indecent programming can still use "lockboxes" to lock out selected channels, of course. But in that case, it is the lockbox and not the § 10(b) blocking scheme that is doing all the useful work in shielding children from indecent programming. *See infra* Part III.C.

parents, those "who desire to keep their children from confronting such mailings, [but] who are otherwise unable to do so." *Id.* The *Bolger* case is remarkably similar to ours. The statute and regulations here broadly burden all adults, while assisting only the much narrower class of parents who desire to shield their children from all indecent programming but for whatever reason — absence, fatigue, or unwillingness to work it out — feel unable to do so.

As to the government's second prong, a purist interest in protecting children, regardless of their parents' desires — a justification about which we have grave doubts — the government has notably failed to build any record that parental control of children's television viewing is not reliable by itself and must be supplemented or even overridden by a government censor. Congress and the FCC have in the past relied principally as a justification for regulating indecent cable programming on the need to aid parental supervision and guidance. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984). Governmental restrictions directly interfering with parents' rights to control the information their children receive are regarded with suspicion "regardless of the strength of the governmental interest." *See Bolger*, 463 U.S. at 75. In particular, as demonstrated *infra* in Part III.C., there is no record in the agency here demonstrating that measures currently available such as lockbox technology have been markedly ineffective in shielding children from access to indecent leased access programming. On the other hand, the government has not established that the ban-or-block requirement is sufficiently precise not to overshoot its objective. Adults who desire access to any indecent speech on leased access channels will be entirely deprived or required to specifically request in writing access to an entire channel of it 30 days in advance. If parents choose to request such programming, their children, of course, will also be exposed to it. In fact, the regulation does next to nothing to decouple children's access to indecent programming from adults' access, or to protect children whose parents purposefully bring indecent programming into the home.

To the extent §§ 10(a) and (b) "protect" children at all, they do so by relying on cable operators to ban indecent speech entirely; or

on parental inaction in not subscribing to the segregated channel. The degree to which children are protected is directly tied to the degree to which adult access is curtailed, contrary to the well-established principle enunciated in *Butler v. Michigan* that statutes designed to protect children may not "reduce the adult population . . . to . . . only what is fit for children," 352 U.S. 380, 383 (1957), and in *Bolger*, that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." 463 U.S. at 74.

In this crucial respect, the provisions at issue here differ from the FCC's regulations on indecent telephone communications,[12] which allow adults to retain instantaneous and relatively effortless access to such speech through means such as credit cards, access codes, and consumer-controlled descrambling devices, thereby

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[12] Senator Helms argued on the Senate floor that the § 10(b) segregation-and-blocking requirement "is precisely the same method that Congress used to block dial-a-porn lines," a method which the courts had "validated." 138 CONG. REC. S646 (daily ed., Jan. 30, 1992). The Commission similarly argued that "[t]he blocking scheme upheld in these [telephone] cases is, in all relevant respects, identical to that required by section 10(b)." 8 F.C.C.R. at 1000 ¶ 13. These comparisons, however, are highly inaccurate. As the Ninth Circuit observed in *Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991), the telephone "reverse blocking" scheme, under which telephone companies block all access to providers of indecent speech unless consumers specifically request it in writing, is just one of several alternative access methods permitted under the telephone regulations, and is required only if the message provider elects to bill through the telephone carrier. If the message provider bills directly, it may rely instead on credit cards, access codes, or consumer-controlled descrambling devices to screen out children's access, while allowing adults virtually unimpeded, instantaneous access. Thus in considering whether telephone blocking is the least restrictive means, the court emphasized, "it is critical that the [blocking] system not be considered *in vacuo*" but instead must be seen as part of a "multi-tiered" regulatory scheme which affords both speakers and adult listeners numerous alternative, less burdensome avenues of communication. *Id.*

effectively decoupling children's access from that of adults. *See Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 557 (2d Cir.) (analogizing these approaches to requirements that sexually oriented magazines be kept under opaque covers or in separate adults-only sections of bookstores; "[i]n each case adults continue to have access to the materials, with minimal inconvenience, while minors' access is restricted"), *cert. denied*, 488 U.S. 924 (1988). *See also Enforcement of Prohibitions on the Use of Common Carriers for the Transmission of Obscene Materials*, 2 F.C.C.R. 2714, 2719 ¶ 32 (1987) (Commission's objective in designing telephone indecency regulations was "to select the option effectively restricting access to the communications in question *to adults* which is the least intrusive upon protected forms of expression") (emphasis added). By foreclosing children's access in a reasonably effective manner and only minimally burdening adults' access, the telephone regulations achieve the precision of regulation required by First Amendment jurisprudence. No such precision was attempted in these cable regulations.

2. *"Uninvited Intruder"*

The majority posits an additional governmental interest: protecting citizens from the uninvited "intruder" of indecent programming.[13] Maj. op. at 33- 34. In the *Pacifica* case, the

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[13] The government argues in a footnote to its brief that this is a "legitimate" governmental interest, but nowhere does it suggest that it rises to the level of a "compelling" interest. *See* Government Brief at 37, n.16. Since only a *compelling* governmental interest can sustain a content-based restriction of speech, the government must be deemed to have waived the argument that this justification is sufficient to support the challenged statute and regulation, although the argument had been advanced at the agency level, *see* 8 F.C.C.R. 999-1000, and on the Senate floor, *see* 138 CONG. REC. S648 (daily ed., Jan. 30, 1992) (remarks of Sen. Thurmond). I address the question here, however, in response to the majority's reliance on this rationale.

Supreme Court noted that indecent broadcasts "confront[ ] the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748. But whether this rationale could pass the compelling interest test in the broadcast arena, it cannot qualify in the cable context. The FCC itself takes the position that although cable television too enters the home, it comes as an *invited* guest. *First Report and Order*, 8 F.C.C.R. at 1001 ¶ 17 ("Cable television . . . may well be viewed as an invitee into an individual's home"). *See also Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir.1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167-69 (D. Utah 1982). Subscribers not only consent to, but must affirmatively request cable service. Like magazine subscribers, cable subscribers pay for the service and are free to cancel their subscription at any time if they do not like the programming they receive. Cable television service is indeed popular,[14] but its widespread dissemination does not transform it from an invitee to an intruder. *Compare Pacifica*, 438 U.S. at 748-50 (emphasizing narrowness of holding based on "uniquely pervasive" nature of broadcasts over public airwaves), *with Bolger*, 463 U.S. at 74 (declining to extend *Pacifica* rationale to mailed advertisements even though mail service is universal).

The government could conceivably have an interest in helping consumers "tailor their invitation" to cover only the cable programming they want. But at least with regard to *adults*, that

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[14] The majority correctly points out that more than 60% of all households with televisions subscribe to cable. The majority then adds that "[m]ost cable subscribers do not or cannot use antennas to receive broadcast services," perhaps inadvertently leaving the mistaken impression that without cable, most current subscribers would be left with no television at all. In fact, the quoted passage merely indicates that *while subscribing to cable*, most households do not *simultaneously* receive over-the-air broadcasts. *See* H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 57 (1992). Although some consumers are in areas without broadcast service, many (probably most) of these households could and would receive television broadcasts if they terminated cable service.

interest surely cannot be a compelling one. In *Bolger*, the Supreme Court said that the state's interest in "shield[ing] recipients of mail from materials that they are likely to find offensive" "carries little weight" because "[a]t least where obscenity is not involved . . . the fact that protected speech may be offensive to some does not justify its suppression." *Bolger*, 463 U.S. at 71 (citation and quotation omitted). The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience *cannot avoid* objectionable speech." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541-42 (1980) (emphasis added). As the FCC has repeatedly acknowledged, those adults who object to indecent speech on leased access channels may easily avoid such speech either by cancelling their cable subscriptions and relying on broadcast television as an alternative, or by blocking indecent programs or offensive channels through voluntary lockboxes. *See Broadcast Indecency*, 67 Rad. Reg.2d 1714, 1726 ¶ 62 (1990) (need to regulate indecency is far greater for broadcast than for cable because lockboxes give households control over cable programming entering the home); *Notice of Inquiry*, 4 F.C.C.R. 8358, 8364 ¶¶ 50-51 (1989) (suggesting regulation of broadcast indecency is justified in part by availability of cable as an "alternative" means of adult access to indecent programming where *Pacifica*-type concerns are not implicated due to availability of lockboxes to control access). The "intrusiveness" rationale cannot sustain the challenged provisions.[15]

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[15] In *Pacifica*, the Supreme Court rejected the argument that an individual offended by indecent broadcasts might simply turn off her set, which the Court analogized to "saying that the remedy for an assault is to run away after the first blow." 438 U.S. at 748-49. In the cable context, however, the options of not subscribing or locking out offensive channels are *in addition* to the option of turning off the set. No similar options are available for broadcast media.

C. *Do Sections 10(a) and (b) Meet the Least Restrictive Means Test?*

The government has the burden of showing that the means adopted to achieve the compelling governmental interest are the "least restrictive." *See Sable*, 492 U.S. at 126; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981); *Carlin Communications*, 837 F.2d at 555 ("The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.") (citation and quotation omitted).

As petitioners point out, however, nothing in the record establishes that cable lockboxes — which cable operators are required to provide[16] — are not an effective means of protecting children from "indecent" programming. Indeed, the record strongly suggests otherwise, and even the majority apparently concedes the effectiveness of lockboxes, Maj. op. at 38 n.22. Congress has found lockboxes to be "effective." *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984) (describing lockboxes as a "means to effectively restrict the availability of such [indecent] programming, particularly with respect to child viewers, without restricting the First Amendment rights of the cable operator, the cable programmer, or other cable viewers"). The Commission on several occasions has attested to their efficacy. *See, e.g.*, FCC 85-179, 1985 FCC Lexis 3475, ¶ 132, at *112-13 ("Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commission's standards for indecency . . . ."); *id.* at

[16] The 1984 Cable Act requires each cable operator to "provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A). These in-home devices, known as "lockboxes" or "parental keys," allow subscribers at their own discretion to block reception of any channels they do not wish to receive, either indefinitely or for shorter periods of time. Lockboxes thus allow parents to restrict their children's access to selected channels "whether or not parents are physically present and actively supervise." FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990).

¶ 139, *115 (deleting a previous FCC rule barring cable operators from transmitting indecent origination programming, because the rule had become "duplicative of and indeed surpassed by" the lockbox requirement and other provisions of the 1984 Act under which "the public will continue to be protected from obscene and indecent programming"); FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990) ("Technical means are available to block children's access to indecent cable programs. . . . [Lockboxes] can restrict access by children whether or not parents are physically present and actually supervise."). Not only cable programmers, but cable operators submitted comments during this rulemaking stating that lockboxes are effective. *See* J.A. 94 (programmers); J.A. 250, 253 (operators).

Because the 1992 Cable Act indecency provisions were adopted in a series of floor amendments, without benefit of committee hearings or even substantial floor debate, their legislative history is exceedingly scant. But nowhere in that meager history is there a single comment that anyone in Congress thought cable lockboxes ineffective. *See* 138 CONG. REC. S646 *et seq.* (daily ed., Jan. 30, 1992) (no mention of lockboxes in Senate floor debate); H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 80 (1992) (no mention of lockboxes in conference report describing section 10).[17] Nor did the Commission add any significant findings of its own with respect to the effectiveness of cable lockboxes during this

[17] Senator Helms did erroneously attribute to the Supreme Court the view that "mandatory blocking" in general "is constitutional and far more effective than voluntary blocking," 138 CONG. REC. S647 (daily ed., Jan. 30, 1992). In fact, the opinion he cited, *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992), was authored by a panel of the Second Circuit, and its conclusions reached only the telephone technology involved in the case before it. In any event, Senator Helms's conclusory approbation of that court's decision cannot be taken to represent a considered judgment by Congress concerning the effectiveness of cable lockbox technology. *Cf. Sable*, 492 U.S. at 129-30 (conclusory statements in floor debate unsupported by legislative findings or indications of considered legislative judgment not entitled to great weight).

rulemaking. *See First Report and Order*, 8 F.C.C.R. at 1000 (stating in conclusory fashion, without specific findings, that "[w]e agree with Congress' conclusion that the voluntary lockbox approach is not likely to be as effective as cable operator-blocked channels").

The government nonetheless leans heavily on the analogy to telephone technology, suggesting that "voluntary blocking" techniques are ineffective as a means of shielding children from indecent speech. The FCC, however, promulgated its telephone indecency regulations based upon extensive and detailed findings that voluntary blocking was not effective *in the context of telephone technology*. *See Regulations Concerning Indecent Communications by Telephone*, 5 F.C.C.R. 4926 (1990). The Commission did not conclude that voluntary blocking was in principle unworkable across all technologies; nor did it reach any conclusions whatsoever about cable technology. Instead, the findings were based entirely on considerations specific to telephone technology. That technology is fundamentally different from cable.

First, the Commission found that in the telephone context voluntary blocking was ineffective because telephone companies were able to block only *local* dial- a-porn providers, and for technological reasons were incapable of blocking *long-distance* access to dial-a-porn services. *Id.* at ¶ 16 (telephone blocking technology works by recognizing first three digits of seven-digit local phone number, and blocking three-digit sequences assigned to dial-a-porn services); *see also Information Providers' Coalition*, 928 F.2d at 873. Consequently, voluntary telephone blocking does not prevent minors from accessing dial-a-porn services by long distance calls. That concern is inapplicable in the cable television context, because lockboxes can block *any* channel received in the home.

Second, the Commission found that voluntary telephone blocking was ineffective because telephones, including pay phones, are ubiquitous and readily accessible to children outside the home. 5 F.C.C.R. 4926 at ¶ 16. Although cable television is widely available, it is not nearly as accessible to unsupervised children outside the home as is telephone service. Pay phones in particular provide individual, unsupervised, private access to indecent

communications on street corners and in shopping malls, movie theaters, restaurants, gas stations, parks, and playgrounds.

Third, the Commission found that voluntary blocking was ineffective in the telephone context because many parents were not even aware that dial-a-porn services existed, much less that voluntary blocking technology was available. *Id.* at ¶¶ 18, 20; *see also Dial Info. Serv.*, 938 F.2d at 1542 (half of residential households in New York were unaware of either dial-a-porn services or blocking technology). The level of parental awareness of indecent programming and lockbox technology is far greater in the cable context. Unlike telephone subscribers with access to literally millions of telephone numbers, cable subscribers typically receive only a few dozen channels, and parents would have to be hermits to be unaware through newspapers and even television itself of the debate over sex and violence on the tube. Parental unawareness of indecent cable programming at the level of telephone porn has not been established anywhere in the agency record. The Commission's convincing showing that telephone blocking technology was ineffective at shielding minors has no parallel in this case.

The majority accepts — too readily, I think — the government's contention that because the operator can establish no central editorial control on leased access channels, indecent speech comes into the home more "intermittently and randomly" on leased than on regular channels, thereby defeating the effectiveness of lockbox technology. *See* Maj. op. at 34-36. Because indecent programming can appear on leased access channels at any time, the FCC says, parents must either lock out leased access channels altogether (thus depriving adults in the household of *all* leased access speech), or monitor leased access channels continually, locking and unlocking the control boxes, risking "a slip up or a lapse" that exposes their children to indecent programming. Maj. op. at 35. Less drastic alternatives, however, immediately come to mind. *Segregating* indecent leased access programming, either by channel or by time (*i.e.*, a reasonable "safe harbor" period), would actively facilitate parental control because parents could use *lockbox* technology more effectively, knowing which channels to lock out, and at which

times, to protect their children. Neither Congress nor the FCC has considered whether segregation of indecent leased access programming, when combined with existing lockbox technology, might be an effective yet far less restrictive means of achieving the statute's purported goals than the § 10 ban-or-block scheme.

The majority also suggests that the cost of lockboxes may deter some parents from acquiring and using them. Maj. op. at 38. But again, if this is a real impediment (and there is no record support to show it is), less restrictive means than a ban-or-block scheme are at hand. Cost-spreading — raising everyone's costs the small amount it would take to provide free lockboxes to all takers — would make lockboxes readily available. In fact, many cable operators have already converted to "addressable" systems that incorporate lockbox technology into the cable box that every subscriber receives. *See* J.A. 316-17. These addressable systems accomplish both cost-spreading and universal availability of lockbox technology. Neither Congress nor the FCC considered this new advance in technology.

Finally, neither Congress, the FCC, nor the majority has taken account of where the cost burden of the segregate-and-block scheme will fall, and with what implications for free speech. There are only a few prospects: the cable operators, producers of "indecent" speech, leased access programmers generally, subscribers to "indecent" speech, or subscribers generally. The majority concedes that if the cost is borne by cable operators, it could create sufficient incentives for operators to ban (rather than block) indecent programming so as to implicate state action, and therefore to invalidate § 10(a) as an indirect form of state censorship. *See* Maj. op. at 24. But the majority never considers that if the cost of segregation-and-blocking is placed entirely on programmers of "indecent" speech — or on those who wish to receive such speech — the regulation will place a direct and heavy burden on a content-defined class of constitutionally protected speech. Whether that burden would be so great as to actually deter such speech, we cannot say; nothing in the record warrants a conclusion either way. But if the burden is on the *government* to show that its

content-based regulation is the least restrictive means, it must face and explain away those potential problems.

IV. State Action is Indeed in Section 10(c) and It Does Not Meet the "Least Restrictive Means" Test

A. *Does State Action Inhere in Section 10(c)?*

State action also inheres in the statutory scheme of § 10(c). In the 1984 Cable Act, Congress authorized local franchising authorities to require cable operators to set aside channels for noncommercial public, educational, and governmental use ("PEG access"), 47 U.S.C. § 531(b), and forbade cable operators from exercising any editorial control over programming on those channels, 47 U.S.C. § 531(e).[18] Then, in § 10(c) of the 1992 Cable Act, Congress changed the rules with regard to a content-defined category of speech, authorizing cable operators "to prohibit the use [of PEG channels] for any programming which contains . . . sexually explicit conduct," Pub.L. No. 102-385, § 10(c), 106 Stat. at 1486, which the FCC has interpreted to mean "indecent" programming, *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993).

Quite plainly, the revised statutory scheme is on its face a content-based regulation of protected speech. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of their . . . [content] are content-based." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). Under the statute, cable operators and programmers are subject to two fundamentally different statutorily-assigned schemes of substantive and procedural rights, duties, and burdens with respect to PEG programming. Which of those schemes applies

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[18] Section 531(e) contains an exception, however: cable operators may under certain circumstances ban programming that is "obscene or . . . otherwise unprotected by the Constitution of the United States." 47 U.S.C. § 544(d)(1).

depends solely on whether the content of the programming meets the government's definition of "indecent." *Cf. id.* at 2459 ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or *impose differential burdens* upon speech because of its content.") (emphasis added); *id.* at 2460 (must-carry rules are not content-based because they "impose burdens and confer benefits [on cable operators and broadcasters] without reference to the content of speech" and "interfere with with cable operators' editorial discretion" even-handedly, so that "the extent of the interference does not depend on the content of the . . . programming"). The result is that under the government's scheme of differential regulation, indecent speech — as defined by the government — alone is subject to banning by cable operators.[19] To borrow language from the original panel opinion, "the government first strips a cable operator of editorial power over access channels, then singles out material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only." *Alliance for Community Media v. FCC*, 10 F.3d 812, 821 (D.C.Cir.1993), *vacated*, 15 F.3d 186 (1994).

What reason could Congress possibly have for assigning operators and programmers different rights, duties, and procedures on the basis of such a governmentally-defined content distinction? The only answer is that the government disfavors "indecent" speech, and seeks through this differential regulation to limit speech

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[19] Although our emphasis is properly on the statutory scheme of § 10(c) itself, which petitioners challenge here, it is also clear that the nature of the cable operator's decision to ban indecent programming under § 10(c) is of an entirely different character from the exercise of professional medical judgment at issue in *Blum v. Yaretsky*. As the *Blum* Court explained, those medical judgments were made "according to professional standards that are not established by the State," 457 U.S. at 1008. In contrast, the statute here *forbids* the cable operator from exercising, with respect to leased access programming, broad editorial discretion "according to professional standards . . . not established by the State." Instead it specifically authorizes a single, highly constrained decision — whether or not to ban material classified as "indecent" under a government-imposed definition.

in that disfavored category — a purpose the government does not disavow. This purpose has nothing to do with restoring genuine "editorial control" to cable operators. The majority's attempt to characterize § 10(c) as a return of "editorial control" sunders the provision from the context of its enactment as part of a broader measure seeking to suppress indecent speech, as well as from its statutory moorings as a singular, content-based exception to an otherwise flat prohibition on the exercise of private judgment. Surely if Congress adopted this kind of selective approach to other content-defined categories of speech — for example, authorizing cable operators to ban programs discussing military spending but no other category — the aim of the government's scheme of dual regulation, suppressing the disfavored speech, would be transparent.[20]

We thus have a congressionally-enacted statute that both facially discriminates on the basis of the content of speech, and has a "manifest purpose" to "burden . . . speech of a particular content," *Turner Broadcasting*, 114 S. Ct. at 2461 (*either* facial content-based discrimination *or* "manifest purpose" to benefit or burden speech on the basis of content is sufficient to make the statute content-based, triggering strict scrutiny). With rare exceptions, "'[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Simon & Schuster v. New York Crime Victims Bd.*,

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[20] The "impetus" for the suppression of disfavored speech thus clearly comes in the first instance from the state, and not a private actor. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972) (when "impetus" for discrimination comes from a private party, state must have "significantly involved itself" to establish state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-57 (1974) (state's passive acquiesence in shutoff policy initiated by regulated utility does not implicate state action; the utility's "exercise of the choice allowed it by state law where the initiative comes from it and not from the State, does not make its action . . . 'state action' . . . ."). *Moose Lodge and Jackson* implicitly suggest that when the "impetus" or "initiative" for the deprivation comes from the state — as here, through enactment of § 10(c) — state action is more likely present.

502 U.S. 105, 116 (1991) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

When the § 10(c) statutory scheme works as intended, and cable programmers and adult audiences are deprived of opportunities to communicate and receive indecent speech, that deprivation is "caused by the exercise of some right or privilege created by the State," *Lugar*, 457 U.S. at 937, namely the cable operator's narrow statutory authorization to ban indecent speech (and only indecent speech). And Congress and the FCC, the "part[ies] charged with the deprivation," "may fairly be said to be . . . state actor[s]." *Id.* Because the dual requirements of *Lugar* are met, the deprivation is "fairly attributable" to the government, *id.*, and state action is present.

As the *Lugar* Court explained, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936. Here, a determination that state action is present does not intrude into an "area of individual freedom" — no such sphere was left after Congress denied cable operators control over the content of PEG programming in the 1984 Act, and it is patently obvious that through § 10(c) Congress has not foreshortened but rather extended the "reach of federal law" by creating a narrow, governmentally-structured choice whether to ban a single governmentally-defined category of speech. Where federal law reaches, constitutional scrutiny must follow. Nor is it unfair to attribute to the government the intended and wholly foreseeable consequence of its statute, the suppression of indecent speech. Indeed, under these circumstances it would be grossly unfair and contrary to the principles underlying the state action doctrine to allow the government to evade constitutional responsibility for its own conduct, simply because it has set up a private party as the triggerman in its carefully crafted scheme.

B. *Does § 10(c) Meet the Least Restrictive Means Test?*

Section 10(c), which authorizes cable operators to ban indecent speech on PEG channels, is fatally flawed because the government has failed to show that the regulation will make any significant contribution toward furthering the government's asserted interest in protecting children from indecent television programming, much less that it is the "least restrictive means" to achieve that purpose. *Cf. Sable*, 492 U.S. at 126 (the means chosen must "further the articulated interest"). Where § 10(c) achieves its intended effect, the result will be a total ban on indecent speech, and therefore a total deprivation of programmers' and adult audiences' rights to communicate and receive such speech. We do not know from the agency record, however, whether the regulation will "protect" one percent, twenty percent, fifty percent, or one hundred percent of the nation's children. Indeed, that is left to the standardless discretion of cable operators. What we do know is that § 10(c), like §§ 10(a) and (b), will be of no use in helping *parents* supervise their children's viewing; the decision is taken out of their hands, and placed in the hands of their cable operator.

In addition, just as with the §§ 10(a) and (b) ban-or-block scheme, § 10(c) shields children from indecent programming only by simultaneously depriving programmers and adult viewers of their speech rights, without attempting to decouple children's access from that of adults. Consequently, to the extent § 10(c) has any effect in shielding children from indecent programming, it also impermissibly "reduce[s] the adult population . . . to . . . only what is fit for children." *Butler v. Michigan*, 352 U.S. at 383. I would conclude that the government has not shown that the § 10(c) permissive ban scheme is the "least restrictive means" to achieve a compelling governmental interest.

V. Conclusion

Because Section 10 is state action restricting constitutionally-protected speech, and because the government has not met its constitutionally-imposed burden of showing on this record that these provisions are the least restrictive means necessary

to achieve the compelling governmental interest of protecting children in the context of the family unit, I respectfully dissent.

EDWARDS, *Chief Judge*, dissenting in part: I agree with the judgment reached by the dissent — that sections 10(a) and 10(b), together, constitute state action and do not provide the least restrictive means to further the Government's asserted interest in promoting the well-being of children. According to the Government, children face harm from exposure to "indecent" programming on leased access cable television, so it is contended that Congress may lawfully act to ban such programming. There is not one iota of evidence in the record, however, to support the claim that exposure to indecency is harmful — indeed, the nature of the alleged "harm" is never explained. This being the case, there is little doubt in my mind that the statute as presently written fails constitutional scrutiny.

I write separately because I do not entirely agree with the analysis underlying Judge Wald's dissent. Frankly, I think that Congress may properly pass a law to facilitate *parental supervision of their children, i.e.*, a law that simply segregates and blocks indecent programming and thereby helps parents control whether and to what extent their children are exposed to such programming. However, a law that effectively *bans* all indecent programming — as does the statute at issue in this case — does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my cable television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming. But Congress surely can, I think, act to help me implement the decisions that I make as a parent. However, this latter interest — facilitating parental supervision — has not been advanced by the Government in this case.

Because the foregoing propositions seem self-evident to me, I will refrain from an elaborate constitutional analysis of section 10's provisions. It is not so much the constitutionality of these provisions that I find perplexing, but rather the shortsightedness of Congress in enacting a scheme that does so little to deal with the ills of television. At bottom, I think this case is much ado about nothing much.

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I agree with the majority that section 10(c) does not constitute state action and, therefore, does not pose any constitutional problems. Section 10(c) merely directs the FCC to allow cable operators to prohibit the use of their PEG-access channels for programming which contains obscenity, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Cable operators' decisions to allow or prohibit such speech are their own; their action or inaction does not trigger any alternative regulatory regimes. In section 10(c), Congress merely returns some editorial control to cable operators, and this is not the least bit objectionable in my view.

Sections 10(a) and 10(b), however, constitute state action. These two provisions, read together, do not merely return some editorial control to cable operators, they tend to mandate a preferred result. Section 10(a) allows cable operators to ban indecent speech, and section 10(b) mandates that those cable operators who do not prohibit indecency must segregate and block the indecent programming. While the language of these two provisions contains a choice — indeed, the majority focuses on this "choice" — the choice is of little moment. Judge Wald's dissent is persuasive on this point.

If the statute did not contain section 10(b), I would agree with the majority that, section 10(a), itself, does not constitute state action, for the same reasons that section 10(c) is unobjectionable. Section 10(a), standing alone, merely directs the FCC to allow cable operators to prohibit indecent programming. But section 10(a) does not stand alone. Section 10(b) hinges on section 10(a): it speaks only to those who "have not voluntarily prohibited under subsection ([a])" and mandates that they segregate and block indecent programming.

In analyzing sections 10(a) and 10(b) separately, the majority effectively ducks the question of incentives. But I cannot comprehend how this issue can be avoided in any decision regarding the legality of the Act. If you are a cable operator interested in making money and you are faced with the virtually

cost-free option of banning indecency or the likely costly option of segregating and blocking indecent programming, which option would you choose? The answer seems easy. However, the majority declines to indulge the obvious, contending that "the Commission has yet to consider the matter" of whether the costs associated with segregating and blocking must be borne by the cable operator. The majority also finds that petitioners have not met their burden of proving that the costs of implementing section 10(b) would drive cable operators to ban indecent speech under section 10(a), a conclusion that seems a bit circular given that the Commission has not yet considered the matter. Nevertheless, the majority admits that "[t]he situation might well be different if the Commission were to adopt a policy that created a significant economic disincentive for operators to segregate and block indecent programming." I think that financially minded cable operators will have little doubt which option to choose. Because sections 10(a) and 10(b) are linked — indeed the costs associated with section 10(b) will prompt financially minded cable operators to choose section 10(a) — the majority's attempt to divide and conquer is not ultimately persuasive.

If the statute did not contain section 10(a), I might agree with the majority that section 10(b) passes constitutional muster. The Government claims that the statute is meant to protect children from the harmful effects of indecent programming. Had the Government offered some evidence of the harmful effects of indecent programming on children, I might find section 10(b), standing alone, constitutional. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (plurality) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C.Cir.1985)). The Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993)). The Government has not offered one shred of evidence that indecent programming harms children.

The Government might have suggested that section 10(b)'s segregate-and-block scheme was meant to further a compelling interest in facilitating parental supervision of the cable programs their children watch. Indeed, in a case argued the same day as this one, the Government described its interest in promoting the well-being of children as encompassing both the interest in shielding children from indecency and facilitating parental supervision. *See* Brief for Respondents at 16-17, *Act v. FCC* (No. 93-1092). This second interest undoubtedly finds ample support in Supreme Court case law. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (stating that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking state law requiring children to attend public schools as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking state law that prohibited teaching in foreign languages to children as interfering with "the power of parents to control the education of their own"). Contrary to Judge Wald's dissent, I do believe that a segregate-and-block scheme would facilitate parental supervision.

In fact, I might find that section 10(b), standing alone, is the least restrictive means of furthering the Government's interest in facilitating parental supervision of children. A segregate-and-block system can help parents monitor the programming their children watch. For those parents who want to keep all indecent programming out of the house, it provides an easy mechanism to do so. For those parents who wish to expose their children to the myriad of leased-access programming, section 10(b) allows them to subscribe to the segregated channels. For those parents who wish to do their own screening, it undoubtedly helps to know that all of the leased-access "indecent" programming is located on one channel. Those parents can control their children's viewing either by instructing them about what they may not watch or by using a lockbox or some such device which gives television owners control

over unwanted programs. As Judge Wald notes, the segregate-and-block methodology embraced by section 10(b) is a rather unsophisticated approach to achieve a goal of parental supervision: surely Congress has reason to know that there are more efficient technological devices available to segregate and block categories of programs and thereby facilitate parental choices of preferred programming. Despite the legislative failure to adopt more efficient alternatives, I would still find section 10(b) unobjectionable if it stood alone and if the Government justified it as a means to facilitate parental supervision. What I might think if the statute were written differently, however, does not help me deal with what is now before the court.

As I see it, sections 10(a) and 10(b) are connected parts of a whole, which work in tandem to produce an absolute *ban* on indecent speech. A ban does nothing to facilitate parents' supervision of their children, unless we assume that all parents' views are not only identical to each other, but also the same as the Government's. This assumption is preposterous, and the Constitution simply does not permit a flat ban of protected speech.

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There is one other aspect of the majority opinion that I find troubling. In a somewhat obscure line of analysis, the majority intimates that *cable* should be subject to the same First Amendment protections as *broadcast*. To advance this point, the majority argues that "the constitutionality of indecency regulation in a given medium turns in part, on the medium's characteristics" and that "it is apparent that leased access programming has far more in common with radio broadcast in *Pacifica* than with the telephone communication in *Sable*." This simple equation is superficially appealing, but it does not produce the result suggested by the majority.

For many reasons that need not be addressed here, I surely agree with the majority that it makes no sense to treat broadcast and cable differently. It does not follow from this, however, that the First Amendment protections afforded to cable should be *reduced* to the level normally reserved for broadcast. *See FCC v. Pacifica*,

438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."). In fact, the Supreme Court recently decided this question and rejected the position seemingly advanced by the majority:

> We address . . . the . . . contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

Turner Broadcasting, 114 S. Ct. at 2456.

Content-based regulations of cable television programming must satisfy exacting First Amendment scrutiny. And a regulation premised on a claim that "indecent" programming causes harm to children must be justified by some evidence of the harm claimed.

POSTSCRIPT

This court has spent a great deal of its energy analyzing section 10: the court has now heard the case twice; and it has produced opinions of considerable length, analyzing a great deal of constitutional case law. And yet, I cannot help but wonder what Congress is doing. Why has Congress chosen to regulate "indecency" on leased-access and PEG-access channels, as opposed to all cable channels? Congress claims it is concerned with protecting children from the ills of televised indecency. Is there any viewing individual who would suggest that leased-access and PEG-access channels constitute the principal sources of our indecency problems on television? While, as the majority states, "there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem," it is ridiculous to believe that leased-access and PEG-access present the most severe aspects of the indecency problem on television in American society.

The majority acknowledges that "there undoubtedly is indecent programming on other cable channels," but notes that "[o]perators have the power to impose a segregation and blocking system on the vast majority of their non-access channels, because their editorial control over such channels is unfettered by federal regulation." While cable operators may have that option, there is nothing to suggest that they are voluntarily segregating and blocking indecent programming in the absence of the Government's regulatory hand. And if Congress really believes that indecent programming is harmful to children, why are commercial cable operators given a free hand to do as they see fit? This makes no sense whatsoever.

The majority quotes the FCC, stating that cable operators generally may provide indecent programming through "per-program or per-channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." However, this is no answer at all, because the current arrangements for cable subscriptions do not purport to segregate "indecent" programs on select channels (or otherwise carefully identify them) so that they might be systematically offered in isolation apart from other commercial offerings. Furthermore, many subscribers purchase cable service to get improved television reception, and a number of basic cable subscriptions are packaged to include channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not. In short, *if* "indecency" really is a problem on television, then the source of the problem resides on the commercial cable stations, not on leased-access and PEG-access channels. Yet, Congress has done nothing to facilitate parental supervision in connection with commercial cable programs.

Even more curious is Congress's failure to address violence on television. One recent poll revealed that eighty percent of Americans surveyed agreed that violence on TV shows is harmful to society. *See* 139 CONG. REC. S5050-52 (daily ed. Apr. 28, 1993) (summary of Times Mirror poll). And there is significant evidence suggesting a causal connection between viewing violence

on television and antisocial violent behavior.[1] Yet, as this case shows, Congress has focused on a mere pittance in addressing indecency on PEG- and leased-access cable, where viewership is paltry. And in focusing on indecency, as opposed to violence, Congress has addressed a "problem" that has yet to be shown to have any harmful effects. This is hard to fathom.

It is not my role as a judge to legislate, I understand. But it is hard to restrain from comment when one is asked to spend so much time on something of so little consequence in terms of its overall effect on society. From my vantage point, Congress seems to have sent the FCC on a fool's errand. Even if section 10 were constitutional — as the majority holds that it is — one still would be tempted to ask, "so what?". I cannot dismiss the importance of the First Amendment rights at stake, however, so I dissent. In my view, sections 10(a) and 10(b) of the Act as presently written offend the Constitution.

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[1] *See, e.g.*, ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 72-76 (1973); WILLIAM A. BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY (1978); GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 159-238 (1989); MONROE M. LEFKOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION (1977); L. Rowell Huesmann, et al., *The Effects of Television Violence on Aggression: A Reply to a Skeptic, in* PSYCHOLOGY AND SOCIAL POLICY 191 (Peter Suedfeld & Philip E. Tetlock, eds., 1992); David Pearl, *Familial, Peer, and Television Influences on Aggressive and Violent Behavior, in* CHILDHOOD AGGRESSION AND VIOLENCE: SOURCES OF INFLUENCE, PREVENTION, AND CONTROL 231, 236-37 (David H. Crowell et al., eds., 1987).

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: Because the court is in agreement that § 10(b) constitutes state action,[1] the most important question in this case is whether the segregation and blocking method established by § 10(b) is the least restrictive means to accomplish the compelling state interests asserted. Essentially for the reasons noted by the Supreme Court in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), the government has failed to support § 10(b) with the requisite showing that the segregation and blocking method represents the least restrictive alternative. It is neither carefully tailored nor supported by evidence that less restrictive alternatives are not readily available. Parts II and III of Judge Wald's dissenting opinion ably describe these deficiencies, and I join her conclusion that § 10(b) is unconstitutional whether it stands alone or in conjunction with the other provisions of § 10.

The court, however, has an obligation to save rather than destroy as much of the statute as is constitutional, *see Tilton v. Richardson*, 403 U.S. 672, 684 (1991) (citations omitted), and, in my view, § 10(b) is severable. Consequently I cannot join Judge Wald's analysis of the severability of § 10(b) from the remainder of § 10 or the constitutionality of the provisions remaining after severance. *See* dissenting opinion of Judge Wald at 10 n.7, 28-31; *see also* dissenting opinion of Chief Judge Edwards at 5.

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (internal quotation marks and citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 108-09; *Champlin Refining Co. v. Corporate Comm'n.*, 286 U.S. 210, 234 (1932). "[T]he presumption is in favor of severability."

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[1] *See* majority opinion at Part III; dissenting opinion of Judge Wald at Part I; dissenting opinion of Chief Judge Edwards at 2.

Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion); *see also Alaska Airlines*, 480 U.S. at 685 ("the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted").

This presumption is not rebutted with respect to the three remaining subsections — (a), (c), and (d). It is true, as Judge Wald notes, that one purpose of § 10 was to "forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (Senator Helms). *See* dissenting opinion of Judge Wald at 10 n.7. Senator Helms' statement quoted by Judge Wald, however, is not the only statement of Congressional intent with respect to § 10. Congress also intended to free cable operators from the burden of being required to carry indecent materials on both leased access and PEG channels. The clear purpose of § 10(c) is to empower cable operators to exercise editorial judgment over their PEG channels to prohibit sexually explicit conduct and materials soliciting or promoting unlawful conduct.[2] Similarly, one of the purposes of §§ 10(a) & (b) was to restore editorial control over leased access programming to the cable operators, a goal deemed of importance to several Senators who spoke in support of the amendments.[3] *See also* majority opinion at 19 ("The

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[2] Senator Fowler offered § 10(c) in order to remove the restriction on the authority of cable operators to prohibit indecent programming on PEG channels. 138 CONG. REC. S649 (daily ed. Jan. 30, 1992). He referred to the use of PEG channels to "basically solicit prostitution through easily discernible shams." *Id.* Senator Wirth, also decrying the abuse of PEG channels, spoke in support of § 10(c) as "giv[ing] a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now. This is a service not only to the public, but, also, to the cable companies themselves." *Id.* at S650.

[3] In introducing what became §§ 10(a) & (b), Senator Helms explained that "[t]he problem is that cable companies are required by law to carry, on leased access channels, any and every program that comes along . . . ." 138 CONG. REG. S646 (daily ed. Jan. 30, 1992) (regarding § 27 (continued...)

immediate aim . . . is to give cable operators the prerogative not to carry indecent programming on their access channels."). Implicit in these comments and the adoption of § 10(c) alone with respect to PEG channels, is the expectation that the restoration of such control would serve the Congressional goal of reducing the amount of indecent programming that appears on cable television and is therefore potentially accessible to children. Thus, it is clear that §§ 10(a) & (c) do fulfill at least one of the purposes of § 10, even when § 10(b) is severed. *See* 2 NORMAN J. SINGER, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION § 44.07, at 518 (5th ed. 1993) (If a statute "attempts to accomplish two or more objects and is void as to one, it may still be valid as to the others.") (citation omitted).

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[3](...continued)

of the Senate bill). He explained that his amendment had two parts:

> Under my amendment, cable operators will have the right to reject such filthy programming, and if they do not reject it, consumers have the right to reject such programming from being fed into their homes.
>
> . . . .
>
> . . . First, the pending amendment will allow a cable company to decline to carry on leased access channels programs that "describe or depict sexual or excretory activities or organs in a patently offensive manner."
>
> . . . .
>
> The second part of the pending amendment . . . . requires the FCC to set rules [to segregate and block] unless a subscriber requests in writing such channel to be unblocked.

Id. In support of Senator Helms's amendment. Senator Thurmond also expressed a desire to relieve cable operators of the obligation of carrying indecent programming. "The problem is that cable companies are required by current law to carry on these leased channels any program that may come along." *Id.* at S648.

Once § 10(b) is severed, § 10(a) no less than § 10(c) would be constitutional. *See generally* majority opinion Part II;[4] *see also* dissenting opinion of Chief Judge Edwards at 2. Although the question is not without difficulty, that §§ 10(a) & (c) restore to cable operators editorial control over a narrow and content- based class of speech, *see* dissenting opinion of Judge Wald at 30, does not render them unconstitutional. *See* majority opinion at 14-15. Without the alternative regulatory scheme, imposing the combined technical, administrative, and financial burdens on cable operators as exists under § 10(b), the cable operator is left with the option, on the one hand, to allow, encourage, or facilitate indecent speech, or, on the other hand, to ban or otherwise impede indecent speech; there is no state imposed burden on the choice.

Accordingly, I concur in the judgment of the court upholding §§ 10(a), 10(c) and 10(d), but I dissent from the holding in Part III that the government has met its burden to show that § 10(b) is the least restrictive alternative; in that regard I join Parts II and III of Judge Wald's dissenting opinion.

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[4] I agree with the reasoning in Part II B only to the extent that the court concludes that petitioners have failed to show here, on this record, that the leased access and PEG channels are "public forums." *See* dissenting opinion of Judge Wald at 10 n.8.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

February 16, 1994

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

and Consolidated Cases

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*.

ORDER

PER CURIAM.

Respondents' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested.

Thereafter, a majority of the judges of the court in regular, active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court in banc, that the suggestion is granted and these cases will be reheard by the court sitting in banc. It is

FURTHER ORDERED, by the court in banc, that the judgment filed herein on November 23, 1993 be, 10 F.3d 812, and the same hereby is, vacated.

A future order will govern further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued Sept. 14, 1993 Decided Nov. 23, 1993

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1171

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC.;
AMERICAN CIVIL LIBERTIES UNION,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1270

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1276

AMERICAN CIVIL LIBERTIES UNION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

I. Michael Greenberger argued the cause for petitioners in Nos. 93-1169, 93-1171, 93-1270 and 93-1276. With him on the joint briefs were *Charles S. Sims, Marjorie Heins, Lisolette E. Mitz, Arthur Barry Spitzer, James Ned Horwood, Andrew Jay Schwartzman* and *Elliot M. Mincberg*. *Michael Kenneth Isenman* entered an appearance for petitioners The Alliance for Communications Democracy and People for the American Way in No. 93-1270.

Gregory M. Christopher, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Renee Licht*, Acting General Counsel, Federal Communications Commission, *Daniel McMullen Armstrong*, Associate General Counsel, Federal Communications Commission, *Stuart E. Schiffer*, Acting Assistant Attorney General, United States Department of Justice, *Barbara L. Herwig* and *Jacob M. Lewis*, Attorneys, United States Department of Justice.

On the brief for intervenor National Cable Television Association, Inc. were *Daniel Leslie Brenner, Michael Stuart Schooler* and *Diane B. Burstein*.

On the joint brief for *amicus curiae* National Law Center for Children and Families and National Family Legal Foundation were *H. Robert Showers, Jr.*, and *James P. Mueller*.

Robert Thomas Perry entered an appearance for intervenors New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group and David Channon.

Paul J. McGeady, entered an appearance for *amicus curiae* Morality in Media in No. 93-1171.

Before MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Petitioners, a group of cable programmers and organizations of listeners and viewers, seek review of two orders issued by the Federal Communications

Commission ("FCC" or "Commission") regulating indecent programming on cable "access" channels. Access channels are those channels a cable operator must set aside for public, educational, or governmental use ("PEG access") or use by unaffiliated commercial programmers ("leased access").[1] We examine two constitutional questions: First, when the government compels private cable operators to relinquish editorial control over a certain number of "access" channels, making these available for general use by unaffiliated programmers, may it permit cable operators to deny access on those channels to programs that are "indecent," as defined by the FCC? Second, if the cable operator does not ban "indecent" programs from leased access channels, may the government compel the cable operators to place on a separate channel all leased access programs that the programmer, as required by law, has identified as "indecent," and to block such channel until the subscriber requests in writing that the block be lifted? As to the first question, we hold that not only does the First Amendment prohibit the government from banning all indecent speech from access channels, it also prevents the government from deputizing cable operators with the power to effect such a ban. As to the second question, in view of the constitutional problems of underinclusiveness presented by the total lack of regulation of indecent programming on commercial cable channels, we decline at this juncture to rule definitively on the constitutionality of the blocked access channel without permitting the Commission to cure the underinclusiveness of the regulations or to justify adequately its regulatory approach apart from the operator ban.

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[1] *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 F.C.C.R. 7709 (1992) (notice of proposed rulemaking); 8 F.C.C.R. 998 (1993) (first report and order); 8 F.C.C.R. 2638 (1993) (second report and order). These orders were issued pursuant to section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, § 10, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558).

I. BACKGROUND

When Congress passed the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Act"), it sought, among other things, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521. To achieve this goal, the 1984 Act required cable operators to set aside "leased access" channels for commercial use by any entity not affiliated with the cable operator. *Id.* at § 532(b). It further authorized franchising authorities to require cable operators to provide "PEG access" channels for public, educational and governmental use. *Id.* at § 531. Because the 1984 Act barred cable operators from exercising any editorial control over either type of access channels, *id.* at §§ 531(e), 532(c)(2) (amended 1992), it granted cable operators immunity from liability for any access channel programming, *id.* at § 558 (amended 1992).

The House Report on the 1984 Act conceived of access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984). As such, Congress embraced access channels as a way to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." *Id.* However, the statute did not grant leased or PEG access to material unprotected by the Constitution. 47 U.S.C. §§ 532(h), 544(d) (amended 1992). In addition, Congress required cable operators to provide subscribers with a "lock-box" that would allow an adult to "prohibit viewing of a particular cable service during periods selected by that subscriber." *Id.* at § 544(d)(2)(A).

In 1992 Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558) ("1992 Act" or "Act"). Section 10 of the Act ("section 10") worked two changes, now being challenged before this court. First, it permits a cable operator to prohibit indecent programming on all access channels. Pub. L. No. 102-385, § 10(a) & (c), 106 Stat. at 1486. Second, it compels those cable operators who do not bar

indecent programming on leased channels to place such material on separate channels that the subscriber can only view by prior written request. *Id.* at § 10(b). In detail, the 1992 Act gives cable operators the authority to refuse leased access to what they reasonably perceive to be indecent programming. *Id.* at § 10(a). It also requires the FCC to promulgate regulations with respect to leased access channels "requiring cable operators [who do not exercise their authority to refuse access to 'indecent material'] to place on a single channel all indecent programs, as identified by program providers." *Id.* at § 10(b). This channel must be blocked unless the subscriber requests access to the channel in writing. *Id.* The Act requires the FCC to promulgate regulations with respect to PEG channels, allowing the cable operator to prohibit "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." *Id.* at § 10(c). Finally, it removes cable operators' immunity from liability for access programming insofar as it "involves obscene material." *Id.* at § 10(d).

In late 1992 the Commission commenced informal rulemaking which resulted in the rules at issue in this case. *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 F.C.C.R. 7709 (1992) (notice of proposed rulemaking); 8 F.C.C.R. 998 (1993) (first report and order) [hereinafter: "*First Report and Order*"]; 8 F.C.C.R. 2638 (1993) (second report and order). The implementing regulations largely track the statute. With respect to leased access they allow the cable operator to "prohibit[ ] any programming which it reasonably believes" is indecent; require programmers to identify any part of their own programming they consider indecent (failure of which would allow the cable operator to deny access); and require the cable operator either to keep such programming from being transmitted or to place all such programming on blocked channels to which the subscriber can request access in writing. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701). With respect to PEG access, the regulations permit a cable operator to "prohibit . . . any

programming which contains obscene material, indecent material . . . , or material soliciting or promoting unlawful conduct[, *i.e.*] . . . material that is otherwise proscribed by law," and authorize cable operators to require programmers to certify that their programs do not contain any material in these categories. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

The regulations have been stayed pending review, and the petitions for review have been expedited and consolidated. *Alliance for Community Media v. FCC*, Nos. 93-1270 & 93-1276 (D.C. Cir. May 7, 1993) (order filed); *Alliance for Community Media v. FCC*, Nos. 93-1169 & 93-1171 (D.C. Cir. April 7, 1993) (order filed). Petitioners challenge section 10 of the 1992 Act and the FCC's implementing rules principally on the basis that they violate the First Amendment and the equal protection component of the Fifth Amendment.[2]

II. ANALYSIS

Petitioners charge that both the authorizing provisions of section 10 and the FCC's implementing regulations (i) are not the least

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[2] In addition, petitioners claim that the FCC changed its position from an earlier reliance on the efficacy of content-neutral lockboxes to the adoption of the more restrictive rules at issue here, and that this change in agency position violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706. Joint Brief for Petitioners at 24, 33. Petitioners' reliance on the APA, however, is misplaced, because Congress has intervened and mandated the more restrictive alternative adopted by the Commission. *See, e.g., INS v. Chadha*, 462 U.S. 919, 955 (1983) (Congress may "legislatively alter[ ] or revoke[ ]" its "delegation of authority" (footnote omitted)). Congress' decisions are exempt from the requirements of the APA. 5 U.S.C. § 551(1). To require an agency to justify its change in position taken at the express direction of Congress would be tantamount to subjecting the legislative decision itself to the APA.

restrictive means to further the government's asserted interest, (ii) impermissibly regulate indecency only on access channels, (iii) will chill protected expression, and (iv) impose a prior restraint on speech without the constitutionally required procedural protections. We distill from this two constitutional questions.

First, when the government requires cable operators to set aside access channels for general use on a content-neutral basis, may it constitutionally permit cable operators to ban indecent material from these channels? The government responds that it may, maintaining that any resulting ban of indecent material from access channels would reflect the editorial judgment of private cable operators to whom First and Fifth Amendment strictures do not apply. For reasons set forth below, we reject the government's argument. Relying on our prior ruling in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*ACT II*"), we hold that the government may not constitutionally authorize a cable operator to ban indecent material from access channels.

Second, if cable operators do not exercise their authority to ban indecent material from *leased access* channels, may the government constitutionally require cable operators to segregate and block indecent material on those channels? Since we hold that the authorization of a complete ban on indecent material from access channels is unconstitutional, we must examine the constitutionality of a segregation and blocking requirement on leased access channels on its own. This in turn requires us to focus on the question of whether the statute and the FCC's implementing regulations impermissibly single out leased access channels for the imposition of a segregation and blocking requirement of indecent programming, while leaving commercial channels and (as a consequence of our decision) PEG channels wholly unregulated, *i.e.*, we must focus on the underinclusiveness of the leased channel blocking device. When the Congress and the Commission originally considered the blocked channel mechanism, they each did so in a context that presented some symmetry between PEG access, leased access, and commercial channels, due to cable operators' authority to exclude indecent material on all three types of channels.

Because we hold today that authorizing cable operators to ban indecent material from both PEG and leased access channels is unconstitutional, the remaining part of the regulation singles out leased access programmers for restrictions far more conspicuously than did Congress when it enacted section 10. As a result, we think it prudential to remand the case to the FCC so that it may consider the legality and/or desirability of the blocked channel device applied to leased access channels only. As a prelude to our analysis, we reiterate that indecent speech, as distinct from obscene speech, is protected by the Constitution. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L.Ed.2d 93 (1989) (striking down ban on indecent telephone messages); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) ("*ACT I* ").[3]

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[3] In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court announced a three-part test for determining whether material is "obscene," and therefore unprotected by the First Amendment: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (internal quotes and citations omitted). Thus, for example, "[p]atently offensive representations or descriptions of ultimate sexual acts, . . . masturbation, excretory functions, and lewd exhibition of the genitals" could be considered obscene, unless they had "serious literary, artistic, political, or scientific value." *Id.* at 25-26. The Court in *Miller* thus essentially "isolate[d] 'hard core' pornography from expression protected by the First Amendment." *Id.* at 29.

The FCC, on the other hand, defines "indecent" material as material "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(g)). It would therefore include in its sweep material that does not appeal to the prurient interest or that taken as a whole may be of the highest literary, artistic,

(continued...)

A. *Section 10's Authorization of Cable Operators to Ban Indecent Programming From Leased Access and PEG Access Channels*

We examine first whether the statute and regulations trigger First and Fifth Amendment scrutiny. The constitutional guarantees of free speech and equal protection of the laws protect against incursion of these liberties by the government but not by private persons. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (free speech); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952) (free speech and equal protection); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (equal protection). The government argues that the parts of the regulations authorizing cable operators to deny access to indecent material do not trigger First or Fifth Amendment analysis because a private cable operator — not the government — would be denying access to indecent material. *See, e.g.*, Respondents' Brief at 16. However, even where it is the decision of a private person which ultimately triggers the abridgment of speech, or effects the challenged discrimination, the state may nevertheless be held responsible if it significantly encouraged the private actor to commit the infringement. *See, e.g., Franz v. United States*, 707 F.2d 582, 592 n.38 (D.C. Cir. 1983) (holding government's encouragement through witness protection program of mother's decision to keep children from father constituted state action). We hold that section 10 significantly encourages the cable operator to ban indecent material, and that the cable operator's ban thus constitutes "state action."[4] As such, it is subject to the same constitutional

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[3](...continued)

political, or scientific value. For example, a truly scientific program — not merely a pretext for showing material that appeals to the prurient interest — that discusses the prevention of life-threatening diseases through the use of condoms could perhaps be considered "indecent" but would hardly seem to lack the scientific or social value so as to lose protection under the First Amendment.

[4] We follow the general usage of the phrase "state action" as encompassing federal, state, or local government action. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1, at p. 524 (2d Ed. 1992).

limitations as those directly constraining the government. In reaching this conclusion, we rely on the Supreme Court's state action doctrine and take specific guidance from *Reitman v. Mulkey*, 387 U.S. 369 (1967), a state action case involving government encouragement of private decisions to discriminate based on race.

1. *State Action in Cable Operators' Decision to Ban Indecent Material from Leased Access and PEG Access Channels*

The Supreme Court has not yet devised an infallible test for determining when actions of private parties are so inter-twined with governmental action as to be attributable to the government for purposes of a constitutional inquiry. The determination of whether state action exists in such cases is generally the result of a complicated and fact-specific inquiry. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Nevertheless, the Supreme Court has found state action to inhere in a variety of situations in which the constitutional violation is ultimately the result of a private decision. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 16 (2d Ed. 1992). We start with the proposition that a state's general regulation of a private industry is insufficient in itself to establish state action. Even if the state confers a license or monopoly power upon a private entity, no state action will be found unless the state is specifically involved in the action being challenged. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The Supreme Court has explained that "the inquiry must be whether there is a sufficiently close nexus between the State and the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 35 (citation omitted). *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The government may, however, be held responsible for the decision of a private party if it has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum*, 457 U.S. at 1004. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (quoting *Blum*,

457 U.S. at 1004); *Jackson*, 457 U.S. at 357 (noting government did not place "imprimatur" on private action); *id.* at 357-58 & n.17 (noting absence of overt or covert encouragement by government); *accord Franz v. United States*, 707 F.2d 582, 592 n.38 (D.C. Cir. 1983).[5] The issue, then, for us is whether by statute or regulation the government has significantly encouraged private cable operators to ban indecent material from access channels.

Under the statute and regulations governing cable television, the cable operator is relieved of all editorial control over access channels, 47 U.S.C. §§ 531(e), 532(c)(2) (amended 1992), except in the case of constitutionally protected "indecent" material, as defined by the government. By granting the cable operators this exceptional authority to ban indecent material totally from access channels, the government expressly furthers an announced policy to limit children's access to such material. 1992 Act, § 10, 106 Stat. at 1486 (entitled "Children's Protection From Indecent Programming on Leased Access Channels").[6] In promotion of that policy, the government requires leased access programmers to identify any of their programming that contains indecent material, *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at § 76.701(d)-(f)), and permits cable operators to require PEG access programmers to identify any of their programs containing indecent material. *Implementation of Section 10*, 58 Fed. Reg. at 19626 (to be codified at § 76.702). Moreover, the government defines what constitutes "indecent" material, 1992 Act, § 10(a) &

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[5] In *Franz*, we noted that the single most reliable indicator of state action is "significant governmental promotion of the specific conduct." *Franz*, 707 F.2d at 592 n.38.

[6] Although the title of section 10 of the 1992 Act refers only to leased access channels, section 10 also includes the provisions concerning indecent programming on PEG access channels. 1992 Act, § 10(c), 106 Stat. at 1486.

(b), 106 Stat. at 1486,[7] and will step in to resolve certain disputes surrounding the administration of that standard, *First Report and Order*, 8 F.C.C.R. at 1010 ¶¶ 73-75.

The government argues nonetheless that, under the regulations, the cable operator is ultimately free to decide whether or not to deny access to indecent programming. The government maintains that with respect to access channels the 1992 Act simply restores to cable operators a measure of the editorial control they enjoyed prior to the 1984 Act. We do not find that argument convincing. The Supreme Court has consistently held the government responsible for discrimination that it significantly encourages and has refused to allow it to encourage discrimination on the part of private actors on grounds that it could not itself invoke. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

In *Reitman*, a private property owner refused to rent an apartment to a couple based on race. He justified his action by citing to a state constitutional amendment establishing the right to discriminate in housing, which implicitly repealed earlier fair housing statutes. The United States Supreme Court affirmed the state supreme court's decision striking down the state amendment as violative of the Fourteenth Amendment, on the ground that "a prohibited state involvement could be found even where the state can be charged with only encouraging, rather than commanding

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[7] Section 10(a) authorizes the cable operator to prohibit leased access programming that "the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a)(2), 106 Stat. at 1486. Section 10(b)'s blocking requirement defers to the FCC's definition of "indecent" material, *id.* at § 10(b), as material "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(g)). The Commission also applies the same definition of "indecent" material when regulating PEG access channels. *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702).

discrimination." 387 U.S. at 375 (internal quotes omitted). It approved the state court's decision which "quite properly" examined the amendment in "terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Id.* at 373 (quoting state supreme court). In *Reitman*, the Supreme Court rejected the argument that the amendment merely restored the power to discriminate that private property owners had enjoyed prior to the fair housing amendments. Instead, the Supreme Court upheld the state court's finding of state action and invalidation of the amendment based on an assessment that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market[; that t]he right to discriminate is now one of the basic policies of the State . . . [and that] the section will significantly encourage and involve the State in private discriminations." *Id.* at 381. Taking guidance from *Reitman*, we examine the regulatory scheme before us in terms of (a) its immediate objective, (b) the context in which the specific authorization to ban indecent material was issued, and (c) the regulations' ultimate effect.[8]

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[8] Unlike the case before us, *Reitman* involved an amendment to the state constitution that also banned future enactment of fair housing laws without an additional amendment of the state constitution. *See Hunter v. Erickson*, 393 U.S. 385, 389 (1969). The 1992 Act, of course, could be changed by simple legislation. That difference, however, is not critical in our reasoning. While *Reitman* notes that the right to discriminate "was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government," 387 U.S. at 377, it clearly did not rely on this fact for its basic reasoning, nor was its reasoning limited to the constitutional amendment context, as evidenced by its discussion of *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914). In *McCabe* the Supreme Court dealt with a statute that required segregation of races in railway cars and, as construed by the Court, also permitted carriers to provide cars for whites only but not for blacks. 235 U.S. at 161. The *Reitman* Court said that the *McCabe* "Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be 'acting in the

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a. *The Immediate Objective of the Regulations*

There can be no doubt that the immediate objective of the 1992 Act is to suppress indecent material and limit its transmission on access channels, a purpose the government admits raises First Amendment concerns should state action be present.[9] The government argues before this court and section 10 itself states that the purpose of the regulation is to limit children's access to indecent material. 1992 Act, § 10, 106 Stat. at 1486.

b. *The Context of the Regulations*

The context of the regulations evinces an effort on the part of the government to enlist the cable operator in the suppression of

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[8](...continued)

matter under the authority of a state law.'" *Reitman*, 387 U.S. at 379 (quoting *McCabe*, 235 U.S. at 161-62). *Reitman* continued, "[t]his was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." *Id*. Whether derived from a statute or a constitutional amendment, significant encouragement by the state of specific private acts suffices for a finding of state action. Such a finding depends upon the context surrounding the state's encouragement, not upon its technical status as constitutional amendment, statute, or administrative regulation.

We also decline to limit *Reitman* to the context of racial discrimination in violation of the Fourteenth Amendment. State action principles developed in the area of racial discrimination are not *sui generis*. Courts have frequently drawn on race discrimination cases for state action principles and applied them in other areas of the law. *See, e.g., Jackson*, 419 U.S. 345 (deprivation of property without due process of law), *Blum*, 457 U.S. 991 (denial of hearing prior to skilled nursing facilities' discharge or transfer of Medicaid patients), *Franz*, 707 F.2d at 590-94 (government's involvement in denial of husband's access to his children due to wife's membership in witness protection program).

[9] Indeed, the government's counsel conceded at oral argument that if the court finds state action, the government loses on the validity of that part of the regulations permitting the prohibition of all access to indecent programs.

indecent material. The government focuses the cable operator's attention on the only material the government seeks to suppress, and then permits the cable operator expressly to suppress that — and no other — material.

First, the regulations facilitate the identification of material the government wishes to suppress. In the case of leased access the regulations require cable programmers to identify indecent material contained in their programs, *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(d)-(f)), and in the case of PEG access the regulations expressly permit the cable operator to require such identification, *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702). These requirements of identification apply only with respect to the government-defined material. 58 Fed. Reg. at 7993, 19,626.

Next, the government has stripped the cable operator of any editorial control over cable access channels except for programming the government wishes to suppress. This aspect of the regulations persuades us to reject the government's reliance on three cases in which courts found no state action present in telephone companies' suppression of indecent messages furnished by message providers. *See Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991) (finding no state action in carrier's compliance with governmental requirement to block indecent messages until adult customer requests block to be lifted); *Dial Info. Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992) (same); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (finding no state action in carrier's refusal to place any indecent messages on its message network where governmental prohibition was only directed at obscene material). At issue in each of these cases, were only those messages for which telephone companies would collect the fees from customers on behalf of the message providers. Messages for which the carrier did not provide these "billing services" could, in each of the three cases, be transmitted freely. Moreover, the carrier was under no governmental obligation to provide billing services to any message provider.

These cases held that governmental regulation of messages for which carriers voluntarily provided billing services was insufficient to convert the private action at issue into state action. *See Information Providers'*, 928 F.2d at 877; *Carlin*, 827 F.2d at 1293, 1295, 1297[10]; *Dial Info.*, 938 F.2d at 1543. We read the absence of state action in the telephone context to derive from the absence of any governmental coercion to provide billing services for message providers. In the case before us, on the other hand, the government *is* compelling the cable operator generally to accept all programming for leased and PEG access channels on a content-neutral basis, but allows the cable operator to refuse that access when the message is indecent. If access to a cable channel serves as the parallel to billing services in the telephone cases, there is, in our case, indeed a compulsion to provide the service generally, *i.e.*, on a content-neutral basis for nonindecent material. The government's involvement in the case before us is consequently far greater than in the telephone cases because the government permits no editorial control over cable access channels except when indecent material is involved. In this case, the cable operator must rely on section 10 of the Act and the contested regulations for authority to ban indecent programming, because the government does not permit the cable operator to refuse to carry a programmer's constitutionally protected speech for any other reason.[11] *Cf. Reitman*, 387 U.S. 369.

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[10] The significance of the fact that the carrier in *Carlin* was voluntarily providing billing services to message providers is somewhat buried in the case, but nevertheless obvious. While the *Carlin* court assumes that the telephone company must offer its service to all alike without discrimination, 827 F.2d at 1293, it rejects the idea that the carrier must provide access to its "976 network" on a content-neutral basis, *id.* at 1295, *i.e.*, access to the 976 network, which is the carrier's billing services network, *id.* at 1293, is entirely voluntary, *e.g.*, *id.* at 1297.

[11] Of course the regulations also permit the cable operator to ban "material that is otherwise proscribed by law." *Implementation of Section 10*, 58 Fed. Reg. at 19,626. For state action purposes the same analysis applies to the cable operator's editorial power over this type of material.

To sum up, the government first strips a cable operator of editorial power over access channels, then singles out the material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only.[12]

c. *The Ultimate Effect of the Regulations*

The ultimate effect of this banning authorization is hardly in doubt; the legislative history indicates that many cable operators will eagerly ban indecent programming. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991).[13] Under the statute and regulations, the cable operators have no incentive whatsoever to allow indecent access programmers onto leased access or PEG access channels. Of course the very reason for mandating access in 1984 and for continuing to mandate access of nonindecent material in 1992 was that unaffiliated programmers are *unable* to gain access to regular, commercial cable channels. A cable programmer seeks access to either leased or PEG access channels precisely because a mutually agreeable arrangement to transmit the program on regular commercial channels cannot be reached. *See id.* Indeed, the Act even regulates the rates that a cable operator may charge a programmer for transmission on leased access channels precisely because cable operators have traditionally priced leased access out of the range of many programmers. *See* 1992 Act, § 9, 106 Stat. at 1484; S. REP. NO. 92, 102d Cong., 2nd Sess. 31. For all these reasons, the government can confidently rely on cable operators to

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[12] The context of the case before us presents an even stronger case for state action than that in *Reitman* where the amendment left the property owner free to discriminate on any grounds he chose.

[13] The fact that cable operators willingly follow the government's encouragement does not immunize the government from taking responsibility for those actions. *See Peterson v. City of Greenville*, 373 U.S. 244 (1963) (regardless of actual motivation of private party, government must take responsibility for result it commands); *accord Carlin*, 827 F.2d at 1295. To the contrary, *Reitman* illustrates that the government's reliance on the willing compliance of private citizens is a factor increasing--not diminishing--the government's involvement. *See, e.g.*, *Reitman*, 387 U.S. at 381-87 (Douglas, J., concurring).

grasp the opportunity to ban certain kinds of leased and PEG access programming if they are permitted to do so. In that respect, the regulations appear as "a form of sophisticated discrimination whereby the [government] . . . harness[es] the energies of private groups to do indirectly what [it] cannot [constitutionally] . . . do [itself]." *Reitman*, 387 U.S. at 383 (Douglas, J., concurring) (footnotes omitted).

We conclude therefore from the immediate regulatory objective, its context, and its ultimate effect, that the total denial of access for indecent material authorized under the statute and implementing regulations constitutes state action and is therefore subject to the same constitutional restrictions that constrain the government if it were to enforce such a ban directly.[14]

2. *Indecent Speech and the First Amendment*

Indecent, nonobscene language is protected by the First Amendment, but is not immune from regulation. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down total ban on 'indecent' commercial telephone messages); *ACT I*, 852 F.2d 1332, 1340 (D.C. Cir. 1988).

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[14] In the case of leased access, *Robinson v. Florida*, 378 U.S. 153 (1964), further supports our conclusion that state action attaches to the actions of a cable operator who must either ban indecent material or segregate and block such material. *Robinson* signals that if a state imposes considerable enough burdens on one of a private actor's alternative choices, the private party's choice of the less burdensome alternative will be fairly attributable to the state. In that case, a restaurant owner who refused to serve blacks had called the police to remove a racially mixed group. A state regulation required racially segregated lavatory facilities "where colored persons are employed or accommodated." 378 U.S. at 156 (internal quotes and citation omitted). This burden on restaurants serving customers of both races was sufficient to implicate the state in a private restaurant's refusal to serve blacks altogether. The Court held that the burden imposed by the regulation on serving customers of both races evidenced that the trespass convictions were more than the result of a purely private decision to discriminate, and so reflected "state policy." *Id.* at 156-57.

Reasonable time, place or manner restrictions on speech may be imposed, but where a statute regulates speech "in terms of subject matter[, t]he regulation '. . . slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (quoting Harry Kalven, Jr., *The Concept of the Public Forum:* COX V. LOUISIANA, 1965 SUP. CT. REV. 29). *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980); *ACT I*, 852 F.2d at 1343 n.18. Because section 10 expressly regulates access programming on the basis of whether it contains indecent material, it must be treated as a content-based restriction and cannot be considered a constitutionally permissible time, place, or manner regulation. Although content-based regulations "presumptively violate the First Amendment," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986), the government "may . . . [, nevertheless] regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest," *Sable*, 492 U.S. at 126. *See Consolidated Edison*, 447 U.S. at 540; *ACT I*, 852 F.2d at 1343 n.18.

3. *Least Restrictive Means*

The government's interest in "limiting the access of children to indecent programming," 1992 Act, § 10(b), 106 Stat. at 1486, has been recognized as a compelling interest. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC's ruling that broadcasting of indecent program in mid-afternoon was in violation of indecency prohibition); *Dial Info.*, 938 F.2d at 1541. While we acknowledge for purposes of this analysis the importance of this interest, we are unpersuaded that the authorization of a ban on indecent material presents the least restrictive means of furthering the asserted interest.[15] The government quite candidly admitted at argument

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[15] *Amici Curiae*, Morality in Media, the National Family Legal Foundation and the National Law Center for Children and Families, urge

(continued...)

that if a cable operator's ban of indecent programming from access channels constitutes state action, that ban is unconstitutional. The total denial of access based solely on the fact that the content of the protected speech is "indecent" raises the specter of "reduc[ing] the adult population . . . [to receiving] only what is fit for children" by permitting and encouraging the cable operator to do just that. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See Sable*, 492 U.S. at 127-31; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (striking down prohibition on mailing of unsolicited advertisements for contraceptives).

This court held in *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), that in attempting to regulate indecency in broadcasting, Congress could not constitutionally enact a complete ban. *Id.* at 1509. We found in that case that the Constitution required some safe harbor period during which "indecent" material may be broadcast. *Id.* We have been presented with no evidence why the context of cable television should command a different conclusion. The government has not advanced any reason why its interest in limiting children's access to indecent material is substantially impugned by providing some safe harbor during which indecent material may be transmitted on the cable network. Nor has it convincingly shown that a variety of less drastic restrictions on indecent programming short of a total ban are ineffective.

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[15](...continued)

that we analyze this ban as merely a refusal of the government to subsidize indecent speech and as such not a subject of strict scrutiny. Brief of *Amici Curiae* at 12-20. Such analysis would, however, require us to go much beyond existing law in determining whether access channels qualify as subsidies and if they do whether their *sui generis* nature as a communication media requires different standards from other subsidies. Neither party has raised this issue in those terms and, moreover, the government has conceded that the bans are unconstitutional if they involve state action. Therefore, we do not believe we are required to undertake such an alternative analysis, involving as it would many complex and as yet undecided constitutional questions in its own right.

The fact that a total ban on indecent programming is not the least restrictive alternative in the case of cable is recognized in the terms of the Act itself. Section 10 of the Act provides the cable operator with the choice of a patently less restrictive means to further the government's interest. The cable operator may transmit indecent material if it places such programming on a separate channel which can only be viewed at the subscriber's express request. 1992 Act, § 10(b), 106 Stat. at 1486. Since Congress has itself judged a channel-block to be an adequate means of furthering its compelling interest, it may not be heard to argue that authorization of a complete ban by cable operators is the only effective means of furthering that interest. Our conclusion as to the unconstitutionality of section 10's authorized denial of any access for indecent programming thus needs no further examination of other, less restrictive means, such as lockboxes, or segregation of indecent material with optional blocking at the subscriber's request. The ban falls under any application of the least restrictive means test.[16]

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[16] In addition to challenging the authorization of cable operators to ban indecent material, petitioners also challenge the regulations' authorization of cable operators to ban from PEG channels material that is "proscribed by law." *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702). Petitioners charge that the operator ban on material proscribed by law is an unconstitutional prior restraint and that the FCC improperly interpreted the underlying statutory language of section 10 which permits cable operators to deny PEG access to "material soliciting or promoting unlawful conduct." 1992 Act, § 10(c), 106 Stat. at 1486. For the reasons expressed in the text of this opinion, we believe that the authorization of cable operators to ban such material proscribed by law constitutes state action. The FCC appeared to concede at oral argument that should state action inhere in any ban involved in this case, such ban would contravene the First Amendment.

An examination of the PEG regulation itself also suggests constitutional infirmity. Even if we limited the regulatory language, which permits a ban on material "proscribed by law," to encompass only material that is constitutionally proscribable under *Brandenburg v. Ohio*, 395 U.S.

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B. *Segregation and Blocking Requirement for Indecent Material on Leased Access Channels*

Having found the authorization to ban indecent material from access channels unconstitutional, we turn now to whether the remainder of the indecency regulation passes constitutional muster. Since we believe that the segregation and blocking requirement as applied only to leased access channels is inadequately justified, we express no opinion as to the general viability of a segregation and blocking approach in regulating indecent material in the cable medium.

Petitioners charge, *inter alia*, that the segregation and blocking requirement impermissibly singles out leased access programmers for regulation, leaving indecent material on commercial channels

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[16](...continued)

444, 447 (1969) ("constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (footnote omitted)), and *Hess v. Indiana*, 414 U.S. 105 (1973) (same), the ban could still be challenged as an unlawful prior restraint, because it lacks the proper safeguards required by the Constitution. "[A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975).

The absence of such safeguards is similarly evident in the Commission's authorization of cable operators to ban obscene material. See 1992 Act, § 10, 106 Stat. at 1486; *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. 76.701(a)); 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702).

Since we are remanding other parts of the regulations to the FCC for other reasons, it will have ample opportunity to reexamine these remaining PEG ban issues.

and (as a result of our ruling) PEG channels unregulated. The government responds that any differential treatment present in the regulatory scheme satisfies the minimal standard of rational scrutiny to be applied in this case. *See* Respondents' Brief at 30. As we discuss below, the government misapprehends the applicable legal standard.

1. *Underinclusiveness and the First Amendment*

The Supreme Court has long recognized that the principles of equal protection and of the First Amendment are intertwined. *See Niemotko v. Maryland*, 340 U.S. 268 (1951); *Mosley*, 408 U.S. at 94-95; *Carey v. Brown*, 447 U.S. 455 (1980); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 n.3 (1987); *see also* 4 ROTRUNDA & NOWAK, *supra*, § 20.11, at p. 48; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201-07 (1983) (noting dangers of emphasizing equal protection in the area of free speech). Under both equal protection and First Amendment analyses, when a regulation aimed at alleviating a problem singles out only some persons contributing to the problem and not others who are similarly situated, the regulation is called "underinclusive." "All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include." Joseph Tussmann and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348 (1949). *See also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.06[B] (1984 & Supp. 1992 (RODNEY A. SMOLLA, ED.)). In First Amendment cases that involve the differential treatment of speakers, "[a]s in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95

(citations omitted). *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978).[17]

While the Supreme Court has recently noted that the First Amendment does not prohibit underinclusiveness *per se*, *see R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2545 (1992), it has consistently applied two principles in examining the underinclusiveness of a restriction on speech. First, the Court has

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[17] While we might analyze this case solely under equal protection principles, we primarily apply First Amendment doctrine because of the centrality of the abridgement of petitioners' free speech. *Cf. Arkansas Writers' Project*, 481 U.S. at 227-28 n.3. Under the guarantee of equal protection, when legislating in the area of economic or social policy, the government is generally free to strike against an evil one blow at a time, *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), but a legislative choice burdening the exercise of a fundamental right must pass strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 & n.15 (1982). While the freedom of speech is, of course, a fundamental right, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), courts have developed different standards for its restriction depending on the particulars of the speech or the type of regulation at issue. *Compare, e.g., Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding where contributions to lobbying organization were generally not tax exempt, exception for veterans organization was speaker-based discrimination not aimed at the suppression of ideas and satisfied rational scrutiny), *with Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." (footnote omitted)); *compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine and right to reply requirement for broadcasting), *and FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down restriction on editorializing by noncommercial educational broadcasting stations receiving federal funds) *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down requirement that newspaper grant right to reply).

held that a restriction on speech may not single out a class of speakers on the basis of criteria that are wholly unrelated to the interest sought to be advanced. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509, 1517 (1993) (holding removal of commercial newsracks in order to promote safety and aesthetics in violation of First Amendment because noncommercial newsracks posing identical problems remained unregulated); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down prohibition on disclosure of sexual offense victims' names where prohibition applied only to instruments of mass communication); *Carey*, 447 U.S. at 465 (holding unconstitutional prohibition on residential picketing in part because exception for peaceful "labor picketing" was unrelated to asserted interest in promoting the privacy of the home). Second, the Court has consistently held that a restriction on constitutionally protected speech must — at a minimum — substantially advance the asserted interest. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down ban on editorializing by noncommercial educational broadcast stations receiving federal funds where prohibition did not substantially promote asserted interest); *Bellotti*, 435 U.S. 765 (same for prohibition on certain corporate speech). Thus the Court has invalidated restrictions on speech in cases where the differential treatment of speakers by a partial regulation remained unjustified in terms related to the asserted interest, or where the regulation did not substantially accomplish the asserted goal.[18] *See also Smith v.*

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[18] Finding a regulation underinclusive need not imply that the government is surreptitiously attempting to further a different, unarticulated interest, but leads to the ultimate conclusion that the regulation, and in particular the classification employed, is not tailored to serve the compelling interest. *Accord News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988); *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc). Without impugning the legislative motive, a court may judge that because the interest asserted is not substantially furthered by the regulation "the 'sacrifice [of] First Amendment protections for so speculative a gain is not warranted . . . .'" *League of Women Voters*, 468 U.S. at 397 (quoting

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Daily Mail Publishing Co., 443 U.S. 97, 104-05 (1979) (holding statute prohibiting newspapers from publishing juvenile defendant's name unconstitutional because, *inter alia*, in absence of regulation of electronic media it did not accomplish the stated purpose). *But see R.A.V.*, 112 S. Ct. at 2545 (underinclusiveness permissible where totally proscribable speech is at issue and there is no regulation of content) (dictum).[19]

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[18](...continued)

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1987)). *Cf. Minneapolis Star*, 460 U.S. at 592 ("We need not and do not impugn the motives of the . . . [l]egislature. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (citations omitted)); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

[19] The Supreme Court recently noted in *R.A.V.*:

> There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

112 S. Ct. at 2545 (citing *Sable*, 492 U.S. at 124-26. The government's reliance on this passage for the proposition that indecent material may constitutionally be regulated on leased access alone is unwarranted. *See* Respondents' Brief at 29.

The cited passage from *R.A.V.* adds little to our case. First, the passage is dictum because *R.A.V.* held that the statute under review in that case did not pass constitutional muster, 112 S. Ct. at 2550. Furthermore, *R.A.V.* notes that the underinclusiveness of a regulation restricting "totally proscribable speech" need not be justified by reference to a neutral basis only "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The case before us differs in both of these respects. Unlike the fighting words at issue in *R.A.V.*, 112 S. Ct. at 2542, the "indecent" material at issue here is constitutionally protected speech, *Sable*, 492 U.S.

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2. *Florida Star, Bellotti, and League of Women Voters*

Applying those constitutional principles to this case, we find that section 10 singles out programmers on leased access channels for regulation, while leaving similar programmers on commercial channels unregulated. *Florida Star, Bellotti*, and *League of Women Voters* similarly involved content-based regulations that selectively applied only to some speakers while leaving identical speech uttered by others unregulated.

In *Florida Star*, the Supreme Court held that a statute prohibiting the publication of a rape victim's name was facially underinclusive because it applied only to "instrument[s] of mass communication," calling into question whether the law advanced the significant interests invoked by the state. 491 U.S. at 540 (internal quotes and citation omitted). The state was under an obligation to "demonstrate its commitment to advancing th[e asserted] interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* "[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order[;] . . . no such interest [was] satisfactorily served by" the prohibition in *Florida Star*. *Id.* at 541. The publication of the victim's name in instruments of smaller, local communication appeared equally damaging to the government's asserted interest, and the regulation could not simply "be defended on the ground that partial prohibitions may effect partial relief." *Id.* (citations omitted). *See id.* at 541-42 (Scalia, J., concurring in part) (noting underinclusiveness should suffice for holding the prohibition unconstitutional).

In *Bellotti*, the statute prohibited specified business corporations from spending funds to publicize their views concerning a state

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[19](...continued)

at 126. Moreover, there is a much more realistic chance that official suppression of ideas is afoot in this situation, since access programmers tend to be a distinctly alternative voice to the mainstream media. *See* H.R.REP. No. 934, 98th Cong., 2d Sess. 30 (1984).

income tax amendment. The Supreme Court affirmed the principle that the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." 435 U.S. at 784-85 (citing *Mosley*, 408 U.S. at 96). In that case the state had argued, *inter alia*, that the statute protected corporate shareholders who did not want their resources spent on propagating views they did not hold. The Court noted that first, the statute restricted corporate speech only with respect to one kind of ballot question and did not apply to other corporate speech presenting the same trapped shareholder problem. *Id.* 435 U.S. at 793. Moreover, the restriction applied only to banks and not other organizations in which individuals may have a comparable membership interest. *Id.*[20] In other words, the statute at issue in *Bellotti* did not substantially advance the government's interest in protecting trapped shareholders. In striking down the statute, the Court concluded that even assuming the compelling nature of the government's interest in protecting the shareholder, there was "'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit" the corporation from speaking. *Id.* at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

League of Women Voters also struck down a restriction on speech that did not substantially advance the asserted interest. At issue was a prohibition on "editorializing" by noncommercial educational broadcasting stations receiving funds from the Corporation for Public Broadcasting ("CPB"). 468 U.S. at 366. As with section 10's exclusive focus on "indecent" speech, the prohibition in *League of Women Voters* was targeted at the content of the speech. *See id.* at 383. The government had argued that the ban was necessary first, to protect stations from becoming the government's "mouthpiece," and, second, to protect them from capture by private interest groups. The Court found that the first interest was not "substantially advanced" by the prohibition. *Id.* at

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[20] The Court also noted the statute's overinclusiveness because the statute prohibited corporate speech on the income tax amendment even when expressly authorized by the shareholders. *Id.* at 794.

388. In partial support of that finding the Court noted that the regulation applied exclusively to local station editorials leaving unregulated CPB-funded *programs* which are distributed nationally and "truly have the potential to reach a large audience and . . . have the kind of genuine national impact that might trigger" the purported government coercion that the regulation was aimed to prevent. *Id.* at 391. In other words, if the regulation were truly targeting the problem of government influence as a result of government funding, it could not consistent with the First Amendment single out for regulation editorializing by local broadcast stations receiving government funds, while leaving unregulated nationally distributed programs similarly receiving government funds. The statute did not substantially advance the first interest because it left unregulated the identical problem existing (more egregiously) in a different segment of the same medium. As for advancing the second interest, *i.e.*, preventing stations' capture by private interest groups, the regulations were underinclusive as well "since the very same opinions that cannot be expressed by the station's management may be aired so long as they are communicated by a commentator or by a guest appearing at the invitation of the station during an interview." *Id.* at 396 (citation omitted). The second interest, therefore, was advanced little — if at all — by the statute. Section 10(b) similarly permits the same indecent material that is segregated and blocked on leased access channels to be transmitted without restriction on commercial channels which are often national and have a far greater audience.

3. *The Underinclusiveness of Section 10*

The ultimate question surrounding a restriction on free speech remains, of course, whether the government's interest is compelling and "whether the statute — particularly the challenged classification — is narrowly tailored to serve that interest." *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1123 (D.C. Cir. 1978) (en banc). However, as *Florida Star, Bellotti*, and *League of Women Voters* indicate, a content-based restriction on rights secured by the First Amendment must, at a minimum, substantially advance the asserted compelling interest and must explain the differential treatment in terms relevant to the interest

asserted. Examining the legislative findings as we must, *see Sable*, 492 U.S. at 129 ("'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'") (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)); *League of Women Voters*, 468 U.S. at 387-88 n.18 (same), we find that section 10's exclusive focus on leased access for the regulation of indecent speech bears a limited relation at best to the goal of limiting children's exposure to "indecent" programming. Section 10 certainly does not substantially advance that interest, since the identical kind of programming may be transmitted freely on regular commercial channels.

The government argues that its regulation legitimately targets the "squeaky wheel" of indecency on cable access channels. Respondents' Brief at 29. The only evidence supporting the contention that leased access channels present a particular problem with respect to indecency is first, the Commission's assertion that because "no single editor control[s] . . . selection and presentation . . . on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs," and second, Senator Helms' statements on the Senate floor invoking anecdotal evidence of exposure to sexually explicit material on leased access channels. *First Report and Order*, 8 F.C.C.R. at 1000 ¶ 15, 1001 ¶ 20 & n.20. The FCC proffers no empirical evidence supporting the contention that leased access channels present a special problem of indecent programming that is absent from commercial channels. For example, it presents no evidence that indecent material on access channels takes viewers by surprise in a manner that regular commercial programming does not; there is no evidence that program guides are less helpful in the access context; no evidence regarding the relative prevalence, or severity of indecent material on leased access versus regular commercial channels; and no evidence indicating that children are more frequently exposed to indecent material on leased access channels than on regular commercial channels. Finally, while the Commission may be correct in noting that access channels, unlike pay channels, are part of the basic cable package and thus not individually invited into a customer's home, *see First Report and*

Order, 8 F.C.C.R. at 1001 ¶ 20 n.20 (quoting 138 CONG. REC. S646 (daily ed. Jan. 30 1992) (statement by Sen. Helms)); *see also* 138 CONG. REC. S648 (statement by Sen. Thurmond) (same), the same thing certainly is true of the commercial channels that make up the basic cable package and are unregulated by section 10. An indecent program would seem to be equally offensive whether transmitted on leased access channels or commercial channels. *Cf. Discovery Network*, 113 S. Ct. at 1514. In sum, the government has not yet sufficiently justified why free access by programmers should trigger the regulation of indecency.[21] As currently argued, free access "is not an acceptable surrogate for injury," *Florida Star*, 491 U.S. at 540; without further justification, the lack of regulation of commercial channels on the one hand and the regulation of leased access on the other, seems to be unadorned, unsubstantiated preference of one speaker over another.

By failing to address the problem of indecent material on regular commercial channels which represent the greater part of the cable medium and reach the same audience (in larger numbers), a serious argument can be made that the regulation selects programmers for regulation by a criterion (*i.e.*, leased access) unrelated to the asserted interest and that the resulting partial regulation does not substantially further the government's asserted interest. This would lead us to hold that the statute and implementing regulations are not narrowly tailored to serve the asserted interest. However, for reasons stated below, instead of striking down this part of the regulation, we remand the case to allow the FCC either to justify or to cure the underinclusiveness of the selective approach to the regulation of indecency represented by the remainder of the regulation after the total ban provision has been struck down. Should it decide to pursue the former path, it

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[21] Of course even if the government's first contention were proven to be true, *i.e.*, that indecent material on access channels takes viewers by surprise because no single editor controls access channels, the FCC remains under an obligation to demonstrate that its regulation presents the least restrictive remedy for that problem. *Cf. League of Women Voters*, 468 U.S. at 395.

must explain the selective regulation of leased access channels in terms relevant to the government's asserted goal and determine the impact of the regulation on the accomplishment of the asserted interests. In so doing, the FCC may examine, *inter alia*, the relative prevalence and severity of and the relative exposure of children to indecent material on leased access channels.

C. *Remand to the FCC*

The segregation and blocking requirements apply only to leased access channels. As enacted by Congress, section 10's regulation of indecency exhibited some measure of symmetry among leased access, PEG access and regular commercial channels, because the cable operator could eliminate indecent material from all three types of channels. We have held today that authorizing cable operators to ban indecent material from leased and PEG access channels is unconstitutional. Were this provision to be severed from the regulations, the remainder of the regulations would require indecent material on leased access channels to be segregated and blocked, while leaving PEG access and regular commercial channels free from any regulation. Moreover, while the cable operator would remain free to regulate indecent material on regular commercial channels, the cable operator is now absolutely prohibited from regulating constitutionally protected indecent material on PEG channels. In other words, were we to sever the segregation and blocking requirement, the result would be a regulatory scheme which singles out indecent material on leased access channels alone for regulation, seemingly without adequate justification. We are therefore reluctant to sever that part of the regulations authorizing a complete ban on indecent access programming from the blocked channel portion and to reach out to decide the constitutional issue presented thereby both as to underinclusiveness and as to the blocked access technique itself, without permitting the FCC to decide again if this is a desirable or feasible regulatory scheme.

"'The cardinal principle of statutory construction is to save and not to destroy.'" *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). "The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is

evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*per curiam*)) (internal quotes and citation omitted). The presumption of severability has been held to vary with the existence of a severability clause in the statute in question. *See Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938) (severability clause reverses presumption of inseparability); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) (same). More recently, however, the Supreme Court has indicated a presumption in favor of severability regardless of the existence of a severability clause: "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 685 (footnote omitted). *See id.* at 686 ("Congress' silence is just that — silence — and does not raise a presumption against severability") (citing *Tilton*, 403 U.S. at 684 (plurality) and *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)); *accord Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). *But see Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 442 (D.C. Cir. 1982) ("We do not view the imposition of any unspecified burden on either side as beneficial to the inquiry."), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); *accord Jackson*, 390 U.S. at 585 n.27 ("determination of severability will rarely turn on the presence or absence of" severability clause).

The analysis differs little in the context of invalidating provisions of regulations promulgated by an agency. *See, e.g., K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). But where an agency is involved, a court need not strike down a regulation to effect a reconsideration by the issuing body. Thus, a court will issue a remand to the issuing agency if there is "substantial doubt" as to whether the agency intended its regulation to be severable. *North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790, 795-96 (D.C. Cir. 1984). Such a remand is often in the best interest of justice in that it allows the agency to reconsider the

residue of its original regulation and keeps judges out of the business of administrators. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) (overturning judicial severance of license conditions, remanding instead to FPC for new license determination in light of invalid provisions); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618-23 (1944) (overturning judicial construction of act and requiring instead Administrator to decide challenged definition anew in light of partial invalidation); *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 422-24 (D.C. Cir. 1990) (remanding case to NLRB to consider severability of unlawful clause in labor contract); *[Anonymous] v. Federal Deposit Ins. Corp.*, 617 F. Supp. 509, 518 (D.D.C.1985) (permitting agency to reconsider order in its entirety, giving it "the maximum possible freedom to tailor precisely any . . . order necessary"). We are particularly reluctant to reach out and decide constitutional issues that might dissolve upon a remand to the issuing agency. *See Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). While we acknowledge that it is not within the jurisdiction of the FCC to declare an act of Congress unconstitutional, *Johnson v. Robison*, 415 U.S. 361, 368 (1974), the Commission may take constitutional considerations into account when promulgating rules. The Commission might, for example, draw on other statutory authority to broaden its restriction on "indecent" programming so as to mitigate the underinclusiveness of its present regulation. We express no opinion on the existence of other sources of statutory authority and believe that it is best left to the expert interpretation of the agency in the first instance.

The Commission did at one point consider the constitutional ramifications of distinguishing between leased access and commercial channels when imposing the segregation and blocking requirement. *See First Report and Order*, 8 F.C.C.R. at 1001 ¶¶ 18-20. However, the Commission's examination took place in the context of a broader regulation key parts of which have now been held unconstitutional. Its treatment of the "underinclusiveness" issue in any case was somewhat cursory and we cannot readily transfer that rationale to a situation in which only

leased access channels are now regulated and only in one particular way.

III. Conclusion

Congress and the FCC sought to create a regulatory scheme in order to restrict children's exposure to indecent material on cable access channels. We do not denigrate its attempt to protect children. However, part of its execution in this case runs afoul of our Constitution. Congress and the FCC authorized private cable operators to ban indecent material from cable access channels in a manner that imbued those private cable operators with state action sufficient to trigger constitutional restrictions on their decision to ban indecent material. As a result, under our prior holding in *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), the authorization of a complete ban on indecent material from access channels is unconstitutional under the First Amendment. The remainder of the regulation dealing with the blocked channel alternative would now apply only to leased access channels while leaving indecent material on regular commercial channels and (as a result of our decision) PEG channels unregulated. This selective regulation of leased access channels alone could itself run afoul of the First Amendment if children remain abundantly exposed to indecent material on other similar cable channels, and unless the selective restriction is justified in terms relevant to the government's asserted interest in imposing the requirement. Reluctant to rule on constitutional issues prematurely, we remand the case to the FCC for reconsideration of the underinclusiveness of the remaining regulatory scheme in light of our invalidation of the portions authorizing cable operators to ban indecent material from all access channels. The stays ordered are hereby continued pending completion of proceedings on remand.

So ordered.

Sec. 10. Children's Protection From Indecent Programming on Leased Access Channels

(a) AUTHORITY TO ENFORCE. — Section 612(h) of the Communications Act of 1934 (47 U.S.C. 532(h)) is amended —

(1) by inserting "or the cable operator" after "franchising authority"; and

(2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.".

(b) COMMISSION REGULATIONS. — Section 612 of the Communications Act of 1934 (47 U.S.C. 532) is amended by inserting after subsection (i) (as added by section 9(c) of this Act) the following new subsection:

"(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

"(A)requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

"(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

"(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

"(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).".

(c) PROHIBITS SYSTEM USE. — Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

(d) CONFORMING AMENDMENT. — Section 638 of the Communications Act of 1934 (47 U.S.C. 558) is amended by striking the period at the end and inserting the following: "unless the program involves obscene material.".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-258

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

FIRST REPORT AND ORDER

Adopted: February 1, 1993; Released: February 3, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub.L. No. 102-385, permits cable operators to enforce voluntarily a written and published policy of prohibiting indecent programming on commercial leased access channels on their systems.[1] Section 10(b) of the Act requires the Commission to adopt regulations that are designed to restrict access of children to indecent programming on leased access channels (that is not voluntarily prohibited under section 10(a)) by requiring cable operators to place indecent leased access programming, as identified by program providers, on a

[1] Section 10(a) is self-effectuating and became effective December 4, 1992.

"blocked"leased access channel. On November 5, 1992, the Commission adopted a *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 7709 (1992), seeking comment on implementation of section 10(b) and related matters. This *Report and Order* adopts rules and regulations that implement section 10(b) of the Act and clarifies other aspects of section 10 related thereto.[2]

2. In the following paragraphs, we discuss the major issues raised by the comments and our conclusions with respect to those issues.[3] Before turning to specifics relating to the statute's implementation, we shall first address the general comments directed to the constitutionality of section 10 and to the adequacy of our *Notice* under the requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

II. SECTION 10'S CONSTITUTIONALITY

3. Many commenters challenge the constitutional validity of section 10 of the Cable Act. Alliance, for example, challenges the constitutionality of both section 10 and the Commission's proposed rule seeking to implement the section. Alliance believes that the statute is unconstitutional because it impermissibly restricts the first amendment rights of access programmers. Restrictions on indecent programming, according to Alliance, may not be applied to cable, unlike other media such as broadcasting, because cable subscribers are not "captive audiences" and, through cable technology, such subscribers have greater control over programming and information

[2] The *Notice* also requested comment on regulations to implement Section 10(c) of the Act, relating to cable operator-imposed restrictions on obscene and other types of program materials on the public, educational, and governmental access channels. We shall adopt regulations that implement section 10(c) in a subsequent *Report and Order*.

[3] We received comments, informal comments, reply comments, and informal reply comments. Those comments or reply comments filed after the prescribed deadlines shall be treated as informal comments. A list of all the commenters in this proceeding is provided in Appendix A.

services than do either broadcast viewers and listeners or telephone subscribers. According to Alliance, the statute and proposed rule are constitutionally infirm because the lockbox approach, rather than blocking, is the least restrictive means to achieve the government's purported aims.[4] Finally, Alliance argues that the statute cannot be justified as necessary since it is underinclusive and does not affect indecent programming on channels other than those used for leased access.[5]

4. Many access organizations filed comments in support of Alliance's comments, although these groups' comments were primarily focused on section 10(c)'s provisions applicable to the public, educational, and governmental access channels. Cable operators, in turn, maintain that section 10 is unconstitutional as to them. For example, Cox Cable maintains that section 10(a) impermissibly "deputizes"cable operators as censors. Operators also assert that other provisions of the new Cable Act and of the 1984 Cable Act (upon which section 10's requirements rest) are constitutionally infirm because, *inter alia*, they impermissibly restrict cable operators' first amendment rights.[6]

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[4] As described in section 624(d)(2) of the Communications Act, a "lockbox" or parental key is a device that enables subscribers to prevent viewing of particular cable services within their homes during periods selected by them.

[5] Alliance also challenges the constitutionality of section 10(c) of the Act because, *inter alia*, it allows cable operators, if they choose, to ban programming containing sexually explicit materials and materials soliciting or promoting unlawful conduct even though such materials are protected non-obscene materials and even though they may not be indecent. As noted above, matters directly pertaining to section 10(c) shall be addressed at a later date.

[6] This view is advanced by many cable operators, *e.g.*, TCI and Time Warner, and by both cable trade associations, NCTA and CATA. We do not address the constitutionality of other parts of the new cable Act as they are not directly at issue here and are not properly within the scope of the *Notice*.

Discussion

5. The courts have expressly recognized that activities of cable operators are affected with first amendment interests. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-495 (1986). Congress, aware of the authority on this subject, has concluded that the provisions in section 10 governing cable activities are legally permissible. We are obligated to execute and enforce the provisions of section 10(b) of the Act as enacted by Congress.[7]

6. Moreover, we believe the constitutional challenges raised by the commenters are without merit. In *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), the Supreme Court, in upholding a ban on obscene telephonic communications but striking down a complete prohibition on indecent telephonic communications, expressly stated that "[t]he Government may [ ] regulate the content of constitutionally protected [indecent] speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." As discussed below, we believe these principles are fully applicable to indecent programming on cable television and that the regulations we adopt to implement section 10 satisfy these requirements.

7. At the outset, it is evident that a compelling state interest underlies section 10 and the implementing regulations. The compelling interest under section 10 is to reduce children's exposure to indecent materials.[8] The Supreme Court has unequivocally stated that the government's "interest in safeguarding

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[7] It is a well-rooted principle of law that "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 258 U.S.App.D.C. 22, 31 (D.C. Cir.1987); also *Johnson v. Robinson*, 415 U.S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

[8] Section 10(b) expressly commands the Commission to promulgate blocking regulations that are "designed to limit the access of children to indecent programming."

the physical and psychological well-being of a minor 'is 'compelling,'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (*quoting Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), and that "[t]his interest extends to shielding minors from the influence of [material] that is not obscene by adult standards," *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978). In addition, as discussed below, Section 10(b) and our regulations implementing the blocking approach prescribed by Congress therein are the least restrictive means necessary to limit children's access to such programming.

Permissibility of Regulating *Indecent Cable Programming*

8. A principal attack raised by commenters as to why the blocking approach in section 10(b) is impermissible is that the characteristics of cable distinguish it from certain other media in which regulation of indecent material has been upheld. According to the commenters, the courts have concluded that cable's differing characteristics preclude all government regulation of indecent programming on the cable medium. More particularly, they point out that regulation of indecent programming has been justified in the broadcast context primarily on grounds that broadcasting is a "uniquely pervasive" medium in society and "uniquely accessible to children,"[9] whereas some federal courts have found that these characteristics do not apply to cable television.[10]

9. We note that each of the federal court cases cited by the parties invalidated state or local laws or ordinances that attempted to impose *complete* bans on indecent programming on cable systems. Section 10(b), in contrast, does not ban such programming but merely requires that indecent programming on leased access be placed on a single channel so that unrestricted

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[9] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978).

[10] *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir.1985); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd per curiam* 800 F.2d 989 (10th Cir. 1986); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

access by children can be prevented. It does not in any way unduly prevent adults from viewing indecent cable programming. In addition, in each of the cited cases, the state or local prohibitions were found to be overly broad in terms of the content sought to be restricted and thus stand in stark contrast to the narrow definition of indecency we have proposed and shall adopt today.[11]

10. These cited cases were also decided prior to Supreme Court's decision in *Sable Communications v. FCC*, 492 U.S. 115 (1989), which clearly indicates that regulation of indecent speech is permissible even though the medium is not broadcasting and, therefore, does not necessarily fit the exact blueprint the Supreme Court applied in *Pacifica* to broadcasting. Thus, the Court has not concluded -- or even suggested -- that indecency regulations, similar to those applied to the telephone medium, cannot be constitutionally applied to cable television. As *Sable* and its progeny indicate,[12] regulation of indecent matter on other forms of expression is constitutionally permissible provided that it meets the "compelling government interest" test and is "carefully tailored."

11. Further, those federal decisions that have invalidated indecency prohibitions on cable have rested in part on the premise that "cable is not an intruder" into the home, but rather "an invitee whose invitation can be carefully circumscribed," *e.g.*, by lockboxes. *See Community Television of Utah, Inc.*, 611 F. Supp. at 1113. These decisions thus do not suggest that the government is precluded from imposing regulations that are intended merely to enable customers to "tailor the invitation"even more carefully -- such as by blocking mechanisms designed to protect children in the home. Finally, even though cable is not now the universal service

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[11] *See also Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (statute prohibiting distribution by wire or cable any pornographic or indecent material to subscribers held unconstitutionally overbroad).

[12] *See Dial Information Services v. Thornburg*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992) and *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

the telephone medium is, nor, as yet, as pervasive as broadcasting in our society, we note that over 60 percent of television households in this country now subscribe to cable.[13] As pointed out by Alliance, approximately 30 million of these homes are provided with an access channel. These figures will undoubtedly increase in the years to come. It would thus seem that blocking is a reasonable, appropriate means to protect the well-being of children in the substantial number of households that now subscribe to cable services. In our view, therefore, the decisions cited by the commenters do not render section 10(b) blocking *per se* unconstitutional.

Least Restrictive Means

12. The other principal attack raised by the parties is that even if government regulation of indecent programming on cable television is permissible, "blocking" as required under the statute is not the least restrictive means to achieve the government's compelling interest. Instead, in these commenters' view, the least restrictive and more effective means would be the existing lockbox approach authorized by Congress in section 624 of the Communications Act, which does not require that programming be identified by a program provider as indecent and placed on a single blocked channel. They believe that without record evidence that lockboxes are ineffective, other blocking mechanisms, alleged as more restrictive, cannot be adopted.

13. At the outset, we note that in *Dial Information Services v. Thornburg*, 938 F.2d 1535 (2nd Cir. 1991), *cert. denied* 112 S. Ct. 966 (1992), the court expressly held that "blocking" mechanisms authorized by section 223 and implemented by the Commission were the least restrictive means to achieve the government's compelling interest to reduce children's access to indecent communications on the telephone medium. In that case,

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[13] Cable television is available nationwide to 89.4 million homes. Out of a total of 92.1 million television households in the United States, there are approximately 55.7 million cable subscribers. *Broadcasting* at 79 (Jan. 11, 1993).

the court reversed the district court because it had erred "in focusing on means, when the focus should be on goals as well as means" in its finding that "voluntary blocking of indecent telephonic communications was the least economically restrictive and therefore the most desirable means of regulation." *Id.* at 1542. The court emphasized that "the means must be effective in achieving the goal" and concluded that "[v]oluntary blocking simply does not do the job of shielding minors from dial-a-porn." *Id.*[14] A similar decision was reached by the federal appellate court in *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991). Moreover, the courts in these and earlier cases were fully aware that voluntary approaches, similar in principle to the lockbox approach, were available to telephone subscribers who wished to preclude the use of their phones for outgoing calls to specific numbers. The blocking approaches adopted by the Commission were nevertheless specifically sanctioned as the least restrictive effective means to achieve the government's interest.[15] The blocking scheme upheld in these cases is, in all relevant

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[14] The court was explicit in its rejection of the lower court's finding: Even if voluntary blocking is assumed to be the least restrictive means of accomplishing the congressional purpose, it clearly is not an effective means. 938 F.2d at 1542.h

[15] *See Dial Information Services v. Thornburg*, at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company"); *Information Providers' Coalition v. FCC*, at 873 ("The Commission concluded that voluntary blocking would not be an effective means of limiting minors' access to dial-a-porn services. We are satisfied that substantial evidence supports this finding and will not disturb it on review."). *See also Carlin Communications v. FCC*, 837 F.2d 546, 546 (2d Cir.1988) ("The Commission bore its burden of showing that the compelling government interest in protecting minors from obscene telephone messages could not be served by less restrictive means. It adequately considered the feasibility and costs of customer premises blocking equipment").

respects, identical to that required by section 10(b).[16] Thus, we have no reason to question the constitutional permissibility of requiring blocking as a means to prevent children's access to indecent materials.

14. We further note that Congress itself has not suggested that a voluntary lockbox approach is the most effective means to prevent children's access to indecent programming. Even though under the 1984 Cable Act, Congress explicitly authorized a lockbox approach to enable subscribers to control access by others within their household to programs appearing on certain cable channels, it did not rule out the possible use of other methods. It merely stated, at the time, that section 624 provides "*one method* for dealing with obscene or indecent programming," H.R.Rep No. 934, 98th Cong., 2d Sess. at 70 (1984) (emphasis added), and said that this requirement "provides *one means* to effectively restrict" access to minors and others, *id.* (emphasis added). In section 10(b) — just as it did in section 223 relating to "dial-a-porn" telephone services — Congress has now determined that mandatory, not voluntary, blocking is essential in effectively protecting children from indecent programming on leased access channels.

15. We agree with Congress' conclusion that the voluntary lockbox approach is not likely to be as effective as cable operator-blocked channels. Moreover, we believe it may have other drawbacks. On leased access channels, for example, programs may come from a wide variety of independent sources, with no single editor controlling their selection and presentation. As a

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[16] Under section 10(b), the cable operator, not the cable subscriber, is required to "block" access to the leased access channel carrying indecent programming just as, under section 223, it is the telephone common carrier, not the telephone customer, that is required to "block" access to telephone lines carrying indecent dial-a-porn messages. Moreover, just as under section 223, a telephone common carrier must in essence segregate telephone lines carrying indecent telephonic messages from others, under section 10(b), cable operators are required to segregate through use of a separate channel indecent leased access programming from the non-indecent programming.

consequence, on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs. Subscribers would thus be required to manually install, activate, and deactivate these devices in an attempt to avoid exposure of their children to such programming, and, even if children were carefully supervised, such attempts would not always be successful.[17] The alternative for such subscribers would be to attach the lockboxes on a permanent basis and to forbear receiving leased access programming entirely.

16. On the other hand, by separating indecent from non-indecent programming and the use of blocking mechanisms, the invitation of cable "as an invitee" can be more "carefully tailored." Subscribers can better protect their children and will not be required to forego entirely (for themselves and their children) receipt of all leased access programming simply in order to avoid possible exposure of children to indecent programming on these channels. The blocking approach thus enhances the rights of viewers to have access to leased access programming and the rights of programmers to reach their intended audiences.

17. In summary, we do not believe the blocking mechanism required by section 10(b) and incorporated in our rules, suffers from constitutional defects. Cable television, like the telephone and other services, may well be viewed as an invitee into an individual's home. Existing law, however, would not appear to preclude that invitee's invitation from being carefully tailored to ensure that the invitee does not overstep the bounds of its invitation in a harmful fashion.

Alleged "Underinclusiveness"

18. Alliance also contends that section 10(b) and the proposed implementing rule are unconstitutional because they affect only access channels and do not address the "entirety" of the

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[17] As the Supreme Court stated in *Ginsberg v. New York*, 390 U.S. 629, 639 (1962), parents and others "who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid the discharge of that responsibility."

problem of indecent programming in the cable medium. Thus, they contend, the claim that the blocking requirement is justified by a compelling interest is undermined, and, hence, the statute and rule are unconstitutional.

19. We disagree. As the Supreme Court recently has made clear, the first amendment imposes no "underinclusiveness" limitation but a "content discrimination" limitation upon the government's prohibition of proscribable speech. The purpose of the prohibition against content discrimination is to ensure that the government may not effectively drive certain ideas or viewpoints from the marketplace.[18] The section 10(b) blocking requirement, of course, does not proscribe speech at all, but merely requires that indecent programming be placed on channels that subscribers must request in order to obtain access. Thus, there is no danger that section 10(b) and our rule will drive ideas or viewpoints from the market.

20. Further, there is no basis for a conclusion that the statute is intended to protect only certain ideas or viewpoints or that official suppression of ideas is afoot.[19] Rather, Congress has determined that some restrictions on the subclass affected by the statute are justified because of the risk of harm to children from indecent programming. Congress thus has merely directed its attention to the specific area where a problem has been identified.[20] It was not required to legislate in other areas where

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[18] *See R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2545 (1992).

[19] *Id.* at 254.

[20] Senator Helms stated that the purpose of these provisions is "to forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," noting that "leased access channels are not pay channels, they are often in the basic cable package." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). Alluding to a specific example of leased access in Puerto Rico, he pointed out that "[t]he situation is likewise out of hand in New York and other States," and (continued...)

no problem of similar degree or magnitude has been found. Given the evidence before Congress concerning the egregious nature of the problems associated with some leased access programming, legislative action was deemed appropriate.[21]

Constitutionality of Section 10(a)

21. In addition to challenging the constitutionality of the section 10(b) blocking approach, Alliance also asserts that section 10(a) is unconstitutional because it permits cable operators to ban completely indecent programming on leased access channels. Although Alliance recognizes that such complete bans are permissible by private parties, Alliance contends that access channels in fact are "public forums" and thus that government action has been taken that implicates the first amendment.

22. We are not aware of any federal decision, including those cited by Alliance, that have directly addressed the question or held that cable access channels are public forums as that term has been defined for the purpose of first amendment analysis. Moreover, the communications facilities and services used by cable operators to provide commercial leased access are analogous in function and purpose to those provided by communications common

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[20](...continued)

read from one subscriber's letter in which she described how she and her daughter were subjected to "verbal and visual violation just by accidentally pushing the wrong button" and seeing "a couple engaged in oral sex." *Id.* We also note that, to the extent cable operators themselves may provide indecent or "adult" programming, such programming is more likely than not to be provided on per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b).

[21] Congress, we note, is not prohibited from legislating restrictions directed to the most patently offensive programming, if it concludes that the risk of children's exposure to such materials is significantly greater on leased access channels than elsewhere. *Cf. R.A.V. v. City of St. Paul, Minnesota* 112 S. Ct. at 2546 (A state might choose to prohibit only that obscenity which involves the most lascivious displays of sexual activity).

carriers. Similarly, we are not aware of any federal court decision that has held, upon constitutional grounds, that communications common carriers operate as public forums. To the contrary, existing case law has explicitly held that the activities of public utilities, such as telephone common carriers, do not constitute state action that would, for first amendment purposes, prohibit such carriers from engaging in content-based discrimination.[22] For similar reasons, we do not believe that the activities of cable operators when they engage in the provision of commercial leased access can be construed as constituting state action.

23. Therefore, to the extent that Alliance and the other parties' comments are directed at the constitutionality of the statute and our implementation thereof, they are rejected.[23] As noted above, in implementing these statutory provisions, we shall to do so in a manner that best protects the constitutional interests of all concerned.

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[22] *See, e.g., Sable Communications v. FCC*, 492 U.S. at 131 (Scalia, J. concurring) ("[W]e do not hold that the Constitution requires public utilities to carry [dial-a-porn]"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (carriers are private companies, not state actors); *Information Providers' Coalition v. FCC*, 928 F.2d at 877 ("a telephone carrier may [ ] ban 'adult entertainment' from its network"); and *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291, 1297 (1987), *cert. denied*, 485 U.S. 1029 (carrier is under no constitutional restraints in its policy of barring all "adult" entertainment from its 976 network). *Carlin* also disposes of Alliance's alternative claims that a cable operator's decision to ban indecent programming constitutes state action or an unlawful prior restraint simply because the cable operator potentially could face liability if it carries obscene programming. *See id.* at 1297 n.6 (the pressure of an obscenity law and resulting self censorship is not an unlawful prior restraint).

[23] Alliance and others also challenge the constitutionality of specific aspects of the statute or our implementation of them. We shall address these arguments below in the context of the specific provisions and requirements of the statute.

III. Compliance with Administrative Procedure Act (5 U.S.C. § 553) Requirements

24. Alliance maintains that the rights of the public have been prejudiced because the *Notice* and/or proposed rule fails to: articulate purposes that would be served by rule; present record evidence of the existence of a problem; present its reasoning on how the alleged problem would be remedied; include a complete description of subjects and issues involved; set forth standards describing the range of alternatives being considered with reasonable specificity; set forth any certification requirement in the proposed rule or a formulation of specific procedures to resolve access disputes or the blocking mechanisms or procedures that might be adopted. Alliance states that the Commission should issue a second notice of proposed rule making and allow a second round of comment. Although not objecting to the adequacy of the *Notice*, MPAA agrees that an additional round of comment is necessary in light of the "extraordinary constitutional delicacy of the issues at hand."

25. We disagree. The Administrative Procedure Act requires an agency to give advance warning of proposed informal rulemaking by publishing a notice containing "either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The Act, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (1980). Given the statutory constraints involved, we believe the *Notice* amply articulated the purposes intended to be served by the rule, *see* paras. 5-9 (limiting children's access to indecent programming) and provided the public an adequate description of the subjects and issues involved (*see* paras. 1-2 relating to "no censorship" and removal of cable operator immunity for obscene programming on access channels and paras. 13-14 relating to and ranging from interpretation of statutory terms to whether cable operator use of certifications would be appropriate). We believe that the *Notice* adequately set forth and elicited comment on the proposals relating

to certification,[24] resolution of access disputes, and blocking mechanisms. Indeed, extensive comments on these and other issues were in fact submitted. Accordingly, we reject Alliance's arguments that the *Notice* did not comply with the APA.

IV. Section 10(a) — Implementation by Cable Operator of a Written and Published Policy Of Prohibiting Indecent Leased Access Programming

26. Section 10(a) amends section 612(h) of the Communications Act, 47 U.S.C. § 532(h), governing commercial leased access, to permit a cable operator to enforce a "written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

27. Cable operators contend that they should have broad discretion regarding the manner in which they implement section 10(a) of the Act. For example, Acton states that the operator should have broad discretion (including, for example, the right to prescreen) in selecting and enforcing its implementing policy and that a cable operator's decision should not be subject to challenge as long as its decision is based on a "reasonable belief" in accordance with the statutory language. NCTA submits that a cable operator should be able to prohibit programming under the "reasonable belief" standard if the operator's belief is based on its review of programming or the operator's receipt of certification from a programmer that the program is not indecent. CATA argues that, just as programmers are required under section 10(b) of the statute to notify the cable operator of indecent programming to be blocked, so too should they be required to notify the cable operator as to whether the program is indecent under section 10(a). TCI

[24] The fact that certification is discussed in the *Notice* as a possible option but is not reflected in the proposed rule appended to the *Notice* does not, contrary to Alliance's assertions, render the rulemaking proceeding invalid.

asserts that the absence of specificity in section 10(a) would appear to signal Congress' intent to afford cable operators' discretion to establish the form and manner of publication of their policies.

28. Denver Access, on the other hand, is concerned that too much leeway provided under section 10(a) will cause cable operators to curtail leased access programming because no standard of reasonableness is required for removal or attachment of conditions to leased access services. Indeed, Denver emphasizes that the self-effectuating provisions of section 10 (and presumably, how they are interpreted and/or enforced) are crucial to leased access program providers and, therefore, the Commission's role in overseeing this part of the statute is vital.

Discussion

29. We are convinced by the language of section 10(a), especially when read in conjunction with section 10 as a whole, that Congress intended to provide cable operators wide discretion to determine the manner in which they may enforce a policy of prohibiting indecent leased access programming, without involvement by this Commission. Section 10(a) expressly states that a cable operator's determination to classify programming as indecent should be based on the operator's "reasonable belief," thereby according the operator wide discretion. Furthermore, in conspicuous contrast to both sections 10(b) and (c), section 10(a) does not require, or grant specific authority to, the Commission to implement its provisions.

30. Moreover, it is clear that Congress did not wish under section 10(a) to compel cable operators to serve as government surrogates and prohibit this type of programming on leased access channels. This is evident from the legislative history of the provision, which reveals Congress' explicit intention to ensure that the imposition of any such prohibition by cable operators would be voluntary, not mandatory, and its concern that cable operators not

be compelled to act as involuntary government surrogates.[25] The legislative history thus makes clear that cable operators are free to decide whether to prohibit indecent programming on these channels — the very same freedom they enjoy with respect to the other channels not subject to access requirements.

31. Cable operators thus need not prohibit indecent programming but are free to ban such programming on their leased access channels as long as they have a written and published policy and, in enforcing any such prohibition, exercise their reasonable belief about which programming is or is not indecent. Section 10(a) would also appear to permit cable operators to adopt any measures appropriate for implementation including, but not limited to, the requirements we adopt under section 10(b), subject to the caveat in section 612(c)(2) that prohibits them from exercising editorial control over leased access programming in any other respects.[26] Further, some cable operators suggest that cable operators have the discretion to prohibit some, but not necessarily all, indecent programming under section 10(a) as long as they block the rest under section 10(b). Given the wide discretion Congress

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[25] Senator Helms, author of this amendment, emphasized that cable operators' actions prohibiting indecent material on leased access channels "is not governmental action" but rather "action taken by a private party." 138 CONG. REC S646 (Remarks of Senator Helms daily ed. Jan. 30, 1991). He further pointed out that the "pending amendment merely gives cable operators the legal right to make that decision" but "does not require cable operators to do anything." *Id.* Even though the view of a sponsor of legislation is by no means conclusive, the Supreme Court has indicated that it is entitled to considerable weight, particularly in the absence of a committee report. *North Haven Board of Education v. Bell*, 451 U.S. 512, 526-527 (1982).

[26] Thus, a cable operator who makes its written policy available to users on request, places it in its public file, and furnishes it to the franchise authority would appear to satisfy the requirement of having a "written and published policy," as Blade Communications suggests. Similarly, this provision would not appear to preclude cable operator reliance upon a user's certification as the basis for its "reasonable belief," as NCTA suggests. *See* discussion at para. 50 and note 42, *infra*.

afforded cable operators under this section, we see no reason to dispute this interpretation.[27] Because Congress appears to have deliberately omitted any role for the Commission in the implementation of this particular provision of section 10 and because programmers are otherwise allowed, under existing statutory provisions, to enforce their rights to commercial leased access in federal district courts,[28] we conclude that the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a).

V. Section 10(b) — Implementation of Blocking Requirement Applicable to Indecent Programming

32. Section 10(b) amends section 612 of the Communications Act of 1934 (47 U.S.C. § 532) by adding new subsection (j)(1) which requires the Commission to promulgate regulations designed to: limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

> (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;
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> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
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> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

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[27] *See also* para. 43, note 39, *infra*.

[28] *See also* subsections 612(d) and (e)(1).

Subsection (j)(2) requires cable operators to "comply with the regulations promulgated pursuant to paragraph (1)."

Thus, this provision requires cable operators to place indecent programming, as defined by the Commission, and as identified by program providers, on a single channel and to block access to this channel unless the subscriber affirmatively requests access to the channel in writing. In the paragraphs below, we discuss implementation of the various components of this provision.[29]

A. Definition of "Indecent Programming"

33. Congress set forth in section 10(a) a definition of indecency to be used by cable operators that voluntarily choose to prohibit indecent programming on the leased access channels. The statutory definition is virtually identical to the Commission's generic definition of indecency and differs only insofar as we have tailored the definition to the particular medium involved.[30] In the *Notice*, we pointed out that, unlike in section 10(a), Congress in section 10(b) delegated to the Commission the task of defining an indecency standard for programming that programmers must identify and cable operators must block.

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[29] Many of the parties submitted comments concerning which persons or entities should be required to bear the costs and expenses under the cable operator-imposed policy under section 10(a) as well those costs and expenses arising from implementation of blocking mechanisms under section 10(b). We believe these issues are more appropriately addressed in the cable rate regulation proceeding in *Notice* of Proposed Rulemaking in MM Docket No. 92-266, FCC 92-544 (adopted December 10, 1992; released December 24, 1992). and thus will be taken up therein.

[30] Senator Helms, author of section 10(a), pointed out that "[t]his definition is exactly the same as the FCC definition." 138 CONG. REC. S646 (Remarks of Senator Helms daily ed. January 30, 1992). He further added that the term indecent had recently withstood constitutional challenge in the *Dial Information Service* case because the court held that it was "sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs." *Id.* (citation omitted).

34. We proposed, for the purpose of implementing section 10(b), to use the definitional language of section 10(a) — i.e., indecent programming would be defined as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." We noted that this language is patterned after the generic definition of indecency found in the standards we have applied to broadcasting and the telephone medium.[31] Just as we have previously tailored our indecency standard to the specific medium involved, we asked whether we should make the definition specifically applicable to the "cable medium."

35. Many of the commenters state that, if the Commission decides that an indecency standard is applicable to cable, the Commission's proposed definition would be appropriate since it would comport with the indecency definition in section 10(a) and parallels the Commission's other indecency definitions. This is particularly important, according to NCTA, because, if the Commission's definition under section 10(b) were broader than that under section 10(a), then the cable operator would be in the "untenable" position of being forced to block programming which it is not able to prohibit under section 10(a).

36. In addition, NCTA and others believe that the Commission should tailor its standard to the "cable medium" because such a step would minimize difficulties by giving the term a narrow definition. Relating to this question, Blade Communications states that the definition should be refined by stating that the relevant community for cable should be cable subscribers and, indeed, further suggests that the definition should be further refined to subscribers of a particular tier or channel. Time advocates adoption of a community standard that is based on the "average cable subscriber" on a nationwide basis, as the

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[31] *See Infinity Broadcasting Corp.*, 3 FCC Red 930, 936 n.6 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) and *Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-1541 (2d Cir. 1991).

Commission has done on the broadcast side. In addition, it states that material should be judged within the context of the whole program and that merit of the work should be considered. Intermedia states that if the Commission is to make the definition workable, it must establish a national standard that preempts state prosecution of programmers and operators. Many of the reply commenters reiterate the importance of adopting a nationwide standard based on the "average cable subscriber."

Discussion

37. We shall adopt our proposed definition of indecent programming. As we pointed out in the *Notice*, the Supreme Court stated in FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), that "each medium of expression presents special First Amendment problems." Our definition thus shall be suitably tailored to include reference to the cable medium, just as our generic definition has been adjusted to other media. In addition, we agree with Time that the standard should be based on the "average cable subscriber,"[32] just as our indecency standard for broadcasting is based on the "average broadcast viewer or listener."[33] In addition, for purposes of our definition, "average cable subscriber" shall mean the "average subscriber to cable television," rather than the average subscriber to a particular cable system or average subscriber in a particular locality.[34] Keeping in mind that the purpose of "indecency" regulation is to protect children from exposure to such materials, we believe that this interpretation, not confined to a

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[32] We decline to adopt Blade Communications' proposal that application of the indecency standard should also take into account particular

[33] *See Infinity Broadcasting Corp.*, 3 FCC Red 930, 933 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 f.2d 1332 (D.C. Cir. 1988).

[34] This approach was strongly supported by the commenters.

specific geographical area or specific cable system, is reasonable and appropriate.[35]

38. We do not agree that any determination of indecency made under the standard is required take into account the work as a whole. As the court in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) stated, "some material that has significant social value may contain language and descriptions as offensive . . . as material lacking such value." Thus, while "merit is a relevant factor in determining whether material is patently offensive," it "does not render such material per se not indecent," since the object sought is to reduce the risk of children's exposure to such materials. *Id.* Of course, as we have reiterated on many occasions, "context" is an important factor of the indecency equation and, to the extent that the overall work as a whole is relevant to the question of "context," it will be considered.[36]

B. Identification by Program Providers of Indecent Programming

39. Section 10(b) directs the Commission to adopt regulations that require cable operators to block access to indecent programs "as identified by program providers." In the *Notice*, we noted that it is the program provider, not the cable operator, who must determine if a program is indecent and, therefore, must be placed on a blocked channel. We pointed out that the cable

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[35] On the broadcast side, we have noted that the Supreme Court does not require, as a constitutional matter, the use of any precise geographic area in evaluating obscene or indecent material. *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), and we have stated that "the determination reached is not one based on a local standard, but one based on a broader standard for broadcasting generally." *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 933 (1987), *remanded on other grounds Action for Children's Television v. FCC*, 852 F.2d 1332 (1988). We believe that similar considerations are applicable here.

[36] *See, e.g., Infinity Broadcasting corp., supra.*

operator is prohibited under section 612(c)(2) of the Communications Act from exercising editorial control over the leased access channels (unless under section 10(a) of the new Act it enforces a written and published policy that prohibits indecent programming). We expressed the view that, under these provisions (and in the absence of a policy authorized by section 10(a)), the cable operator might not have the power to require placement of indecent programming on the blocked channel if the program provider fails to identify the program as indecent or fails to notify the cable operator to that effect.

40. Most commenters, primarily cable operators, agree that producers or programmers should have primary, if not the sole, responsibility to identify programming since they have the best knowledge of the programming. NCTA and several cable operators state that cable operators should not be responsible for the underlying content of such programs but only for failure to block if proper notification is given, unless the operator has actual knowledge that the program is indecent. Others, such as Intermedia, state that because cable operators are also liable for obscene programming, they should be permitted to review or prescreen if they so choose. MPAA, in reply comments, states that lessees should be permitted, but not required, to provide written notice of any programming they believe may be found to be "indecent" by simply requesting carriage on a "blocked" channel.

Discussion

41. The legislative history to section 10 indicates clearly that Congress deliberately chose to pattern this section on the statutory scheme applicable to information providers of indecent materials over common carrier telephone facilities. Senator Helms, the amendment's author, stated that "this [blocking scheme] is precisely the same method that Congress used to block dial-a-porn lines" and has been upheld against constitutional challenge.[37]

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[37] *See* 138 CONG. REC. at S646 (daily ed. January 30, 1992).

42. Under the telephone blocking scheme upon which section 10(b) is based, it is the information provider, not the telephone common carrier, that is required to identify whether the information to be transmitted is indecent. *See Report and Order in the Matter of Regulations Concerning Indecent Communications by Telephone Gen. Docket No. 90-64*, 5 FCC Rcd 4926, 4931 (1990). In adopting implementing regulations in the telephone context, we expressly stated that such a requirement imposes merely a minimum burden on the information provider and obviates the need for the carrier to monitor the communication.[38]

43. Similarly, the statutory language of section 10 expressly requires the program provider, not the cable operator, to identify whether a program is indecent and therefore is subject to the blocking requirement. Given this statutory directive, we do not believe section 10(b) requires cable operators to prescreen or review programs on the leased access channels for this purpose.[39] Cable

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[38] As noted above, the statutory scheme that governs indecent telephone communications was upheld against constitutional challenge in both *Dial Information Services* and *Information Providers' Coalition*. In the latter case, the court rejected a claim that the indecency identification requirement is an impermissible "prior restraint," stating that "labelling matter as indecent under the statute or regulation does not inhibit its dissemination one iota" 928 F.2d at 878. The court further stated that if regulation of indecent matter is constitutionally permissible, "it inexorably follows that for some regulation of indecent speech to occur, the speech must be identified as indecent." *Id.*

[39] Similarly, we do not believe that section 10(b) itself authorizes cable operators to prescreen. Cable operators may, if they choose, prescreen programming as a means to enforce any cable operator policies adopted under authority of section 10(a). Further, we believe that cable operators with policies prohibiting indecent programming have, under section 10(a), the discretion to block any such programming, rather than banning it completely, and, moreover, they may provide such programming on blocked channels during time periods of their own choosing. In addition, wholly apart from the provisions of sections 10(a) and 10(b), we think that prescreening by cable operators cannot be prohibited in light of the

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operators thus will not be held liable under section 10 or our rules for their failure to block programming where program providers have failed to provide the required identification of programming that is indecent. Moreover, given the explicit statutory language requiring programmer identification as a prerequisite to the cable operator's blocking obligation (which signifies Congress' clear intention to limit the responsibility of cable operators), a cable operator will not be subject to liability under section 10(b) even if it has a contrary belief that a program not identified by a program provider is indecent. As discussed in para. 75, *infra*, programmers who violate our rules by failing to identify indecent programming will, of course, be subject to appropriate sanctions.

C. Certification

44. In the *Notice*, we asked, in conjunction with the identification requirement, whether a cable operator can require program providers to certify that their programming is not indecent or obscene. We assumed that all cable operators could require program providers to certify that their programs do not contain obscene materials.[40]

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[39](...continued)

amendment to section 638 that removes a cable operator's statutory immunity for obscene programs on cable access channels. As noted *infra*, however, we believe that cable operators that do not prescreen and thus do not have actual knowledge of any obscene programming on leased access channels, are otherwise immune from prosecution for violations of obscenity laws.

[40] As we pointed out in the *Notice*, section 10(d) of the new Cable Act removed cable operators' statutory immunity under federal, state and local laws for "programming involving obscene materials" on access channels. We agree with Alliance to the extent that it suggests that the language in section 10(d), if read literally, may be too broad to satisfy constitutional standards. The language in 638 should thus be construed to remove immunity only for provision of programming that is unprotected by the first amendment.

45. The majority of commenters supported use of a certification procedure, although some differed as to details that should apply to this process. Other commenters were concerned that requiring certifications could discourage or curtail presentation of live programming on access channels. To alleviate such concerns, NATOA urged the Commission to allow programmers of live formats to certify that they have exercised "reasonable efforts" to ensure that their programs will not contain obscene or otherwise proscribed material. Acton, TCI and Time believe that NATOA's suggestion is reasonable. Some cable operators favor a certification process because it is the least intrusive means of implementing section 10(b). For example, Continental Cablevision argues that, without certification, operators will be forced to adopt a written and published policy and, if so, this could lead to a *de facto* ban on indecent programming. Other cable operators who favor certifications argue that their use should not preclude operators from prescreening or otherwise monitoring programming on the leased access channels.

46. Denver Access, one of the few to express reservations about a certification process for leased access use, argues that certifications can be used in a highly and unnecessarily repressive manner and, therefore, the FCC should permit certifications only under conditions it prescribes and monitors. NATOA states its support for a certification system because it believes that cable operators should not be permitted, must less required, to censor programming. MPAA, in its reply comments, states that lessees should not be required to "certify" that programming is "indecent but, as noted previously, merely request carriage on the blocked channel.

47. Cable operators state that they should be released from liability for carriage of leased access indecent or obscene programming where a programmer has certified that the programming is not obscene or indecent. However, they differ as to the precise form of nonculpability that should attach. For example, some suggest no liability at all in such cases and, therefore, no prosecution at the federal, state, or local level. Others suggest that an affirmative defense should be available or that

common law defenses should be available to operators. For example, TCI asserts that there should be an irrebuttable presumption of no knowledge by an operator if a programmer certifies that programming is not indecent or obscene because Congress clearly removed from cable operators an obligation to make independent judgments about programming.

48. Cable operators thus suggest that they should not be held liable for the underlying content of the programs but only for their failure to place programming on blocked channels upon receipt of proper notification. They are almost unanimous in their views that unless they are protected by a certification process, they will be forced to prescreen and censor programming on the leased access channels. Some also suggest that they should have the right to prescreen even if a certification process is adopted, since they are now liable for carriage of obscene materials. Others suggest that they should be permitted to impose reasonable conditions on carriage of programming on leased access channels, including indemnification provisions. Some assert that they should be permitted to deny carriage to a program provider whose certification was false and some maintain they should be permitted to assess monetary penalties. In their view, those who refuse to certify should be denied access.

49. On the other hand, Alliance maintains in reply comments that certification is not necessary to insulate operators from liability, even for obscene programming. Rather, the Commission should state in its final rule that no liability will attach to an operator if a programmer violates both the Commission's rule (by failing to identify indecent programming) and an operator's policy against indecent programming. According to Alliance, there is "simply no need for the Commission to require that programmers certify the content of their programs." As to obscene programming, Alliance points out that, in accordance with Commission precedent governing MDS common carriers, no liability should attach for that programming either, unless a cable operator had actual knowledge that the programming has been adjudicated obscene. In addition, it maintains that a certification requirement might very well be considered vague and, therefore, incapable of withstanding first

amendment scrutiny, to the extent that it can be likened to an oath and has the effect of chilling speech by forcing self-censorship. Along this line, MPAA, in reply comments, states that requiring program providers to "certify" in writing would violate the Constitution's fifth amendment.

Discussion

50. As indicated above, we think that cable operators can use certification procedures as a means to enforce any policies prohibiting indecent programming that may be established under section 10(a). We further believe that requiring certification is permissible under section 10(b). We will, therefore, permit cable operators to require certification of program providers relating to both indecent and obscene programming on the leased access channels.[41] Although some commenters state that certification would be burdensome and would serve as a further deterrent to those seeking to use these access channels, we believe that a relatively simple, straightforward certification requirement need not have either of these deleterious effects. Further, certification serves as a reasonable means to avoid any questions that might otherwise arise concerning a cable operator's potential liability under our rules and section 10(b) for failure to block indecent programming identified by program providers. In addition, such a requirement is reasonable since cable operators are no longer statutorily immune from liability for obscene materials carried on leased access channels.[42] We thus believe this approach strikes an

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[41] Certification does not remove a cable operator's independent right to prescreen, as addressed in note 39, *supra*.

[42] We agree with Alliance, that under prevailing law, cable operators should be held immune from liability where they do not have actual knowledge of leased access use for carriage of obscene programming. Permitting a certification requirement would further assist a cable operator in defending against any potential prosecution. We also believe that Congress, through enactment of section 10, clearly intended that its legislative scheme would prevail over any state or local laws that attempted to prohibit or otherwise regulate indecent programming on leased access

(continued...)

appropriate balance between the cable operator's rights and obligations under section 10(b) and (d) and the access provisions of section 612(c)(2).

51. Accordingly, we will allow cable operators to require program providers to certify that their programming is not obscene or indecent or, alternatively, to identify the programming that is indecent and required to be blocked.[43] Further, a program provider that does not provide a requested certification for its

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[42](...continued)

channels. Even prior to enactment of section 10, section 612 of the Communications Act was expressly held to preempt state law that prohibited indecent programming on these channels. *See Community Television of Utah v. Wilkinson*, 611 F.Supp. 1099, 1103 (D.Utah 1985), *aff'd Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). With section 10's enactment it is even more clear that Congress intended that the clearly defined scheme in section 10(b) should prevail and thus preempt any state laws that otherwise might govern indecent programming on access channels. We therefore interpret section 10(b) of the Act as immunizing cable operators and programmers from liability for indecent programming where they have complied with the section 10(b) requirements.

[43] We do not believe that any certification requirements imposed by cable operators impermissibly violate program providers' rights under the first amendment, as Alliance maintains, or the fifth amendment's "self-incrimination" clause if required in writing, as MPAA contends. Moreover, even assuming some state action were involved, requiring a certification would not constitute a prior restraint on speech and thus would not implicate any first amendment concerns. *See Information Providers' Coalition v. FCC*, 928 F.2d at 878. At the outset, we note that our rules will not require cable operators to use a certification procedure, but simply will permit them to do so. Further, program providers do not incriminate themselves by certifying that their programming is not obscene or indecent. Nor do they do so by identifying programming that is indecent for purposes of its provision on blocked channels, as they face no potential liability under state or federal law for the provision of indecent programming on blocked channels. *See* note 42, *supra*, concerning preemption of state laws governing indecent programming on blocked channels.

programming will not be entitled to leased access. As suggested by NATOA and endorsed by others, program providers of live programming will be permitted to certify that they have exercised reasonable efforts to ensure that their program are not obscene (or indecent if provided on a non-blocked channel). As stated above, where a program provider's certification that its program is not indecent is erroneous and the program is not blocked out by the cable operator, the cable operator will not be in violation of our rules and the statute.[44]

D. Basic Requirements

1. Contents of Certification

52. Commenters suggested different approaches regarding implementation of a certification process. Some argue that the FCC should specify the form or the content of the certification that may be required of the programmer. New York State states the Commission should require more than a conclusory statement by program providers. TCI suggests that the Commission should allow

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[44] Further, as indicated in note 42, *supra*, such cable operators (or programmers) in compliance with section 10(b) are not subject to state laws regarding indecency, which are preempted by the Cable Act's explicit provisions governing indecent programming. Further, where a certification is erroneous, we believe cable operators would also be immune from potential liability under obscenity laws. *See* notes 39 and 42, *supra*.

We will not deny cable operators the right to request indemnification from leased access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program, certified otherwise by a leased access provider. Notwithstanding some commenters' contentions, this is a reasonable term and condition relating to use of leased access channel capacity in light of the removal by congress in amended section 638 of cable operator immunity for carriage of obscene programming.

certification procedures to be handled contractually by the parties. Commenters generally said that certification should be in writing.

Discussion

53. We decline to specify the precise wording that should be contained in a requested certification. However, for purposes of qualifying as a certification under our rules, we shall require that the certification be made in writing by the program provider. Certification must be made by the person or entity assuming responsibility for the program's content. Thus, certification by an access organization or entity responsible for management of the commercial leased access channels is sufficient if that organization or entity assumes responsibility for the content of the programs intended for commercial leased access. Further, the certification should include the full name, address, and telephone number of such person. We will not require a separate certification for each program.

2. Advance Notice

54. In the *Notice*, we asked for comment "on what would be a reasonable time frame for the required notification by a program provider to the cable operator . . ." We proposed in our rule a seven day advance notice requirement.

55. Commenters differ on what would be a reasonable period for advance notification. Acton suggests a one week period. MPAA, in reply comments, however, states that seven days' notice should be the "absolute maximum." Others suggest longer periods ranging from 14 days to 60 days. Time, on the other hand, believes notification should be made at the time of contracting for access. New York State argues, however, that a single, fixed notice period for each program might constitute an unconstitutional burden on the right of leased access programmers and, therefore, a more general, flexible approach might be suitable.

Discussion

56. We believe that a maximum of thirty days' advance notice prior to the access user's requested time for leased access should be adequate to enable cable operators to comply with the blocking requirement.[45] In our view, a thirty-day time period appropriately balances the interests and needs of leased access users and cable operators. We are aware of the desire of some cable operators to have a longer time period in order to prepare cable viewer guides. We believe, however, that a sixty-day time frame is too long. Our rule will not, we emphasize, prohibit leased access users from providing earlier notification, especially if they wish their programming to be published in monthly viewer guides that cable operators provide to their subscribers. Moreover, we are aware that a specific time slot requested may not be available and, therefore, alternative air dates or arrangements may have to be made. In such circumstances, no further notification from the program provider shall be required. We decline to adopt Time's suggestion that notification should be made at the time of contracting since that proposal may unreasonably hamper the flexibility of program providers committed to leased access use over extended periods of time. For the present, a thirty-day prior notice requirement seems reasonable. If we later find that this approach is too burdensome for either program providers or cable operators, we can alter it accordingly.

3. Record Retention Requirements

57. We sought comment in our *Notice* on whether "a cable operator should be required to retain notifications for a prescribed period of time."

58. Blade Communications argues that cable operators should not be required to retain notifications any longer than the applicable statute of limitations. Cox Cable, however, argues that notifications

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[45] A cable operator will, of course, be free to adopt a shorter advance notification time frame if it so chooses.

should not be kept any longer than three or four months while NCTA argues that there should be a short retention period as well as short period for filing complaints under section 612, as amended under the new Cable Act, which provides procedures for expediting disputes relating to leased access. Time argues for an eighteen-month period which it states is consistent with other record retention requirements, *e.g.*, section 76.225(c) relating to recordkeeping for commercial limits in children's programs. New York State points out that it requires the entity administering its other access channels to retain records for a two-year period.

Discussion

59. We shall require cable operators, consistent with our other cable recordkeeping requirements, to retain copies of program provider identifications and/or certifications for eighteen months from the date of receipt. This will ensure that such information will be available should any disputes arise under section 10(b) or related leased access provisions. As mentioned earlier, the notification or certification shall apply to the leased access user but need not specifically mention each program as long as the access user's notification or certification covers all of the programming intended to be carried on commercial leased access. Program providers will also be required to renew their certifications prior to the expiration of the eighteen month period for programming intended to be shown after that date.

E. Blocked Indecent Leased Access Programs

1. Blocking Mechanisms and Subscriber Access

60. As noted above, section 10(b) specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. In the *Notice*, we stated that "[o]ur proposed regulations would codify these statutory requirements" by requiring cable operators to place such programming "on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the

subscriber so requests in writing." We specifically asked commenters for relevant suggestions or comments "concerning appropriate blocking mechanisms and procedures relating to subscriber access."

61. Cable operators are almost unanimous in holding that the Commission should not prescribe a required method of blocking but should allow maximum flexibility as long as it is effective. Such methods should include scrambling, interdiction (by positive or negative traps), or lockboxes. In addition, Cox Cable states that the cable operator should not have to provide more than one blocked channel. In the same vein, Acton maintains that cable operators should be able to deny carriage if the blocked channel is full, while Time states that the cable operator should be allowed to provide more than one blocked channel if it chooses.

62. MPAA argues, in reply comments, that the Commission should take an expansive view of the "single" channel requirement by not limiting it to a 6 MHz channel standard but should interpret the statute to allow cable operators to provide such programming on multiple compressed channels. Acton also argues that the blocked channel obligation should only arise if an operator chooses to carry indecent leased access programming. TCI maintains that the cable operator should not be required to set aside a channel in advance. Acton also maintains that programmers offering indecent programming should not have a right to insist on the blocked channel option.

63. Acton further states that cable operators should not be required to block the channel on a twenty-four hour per day basis. Many other cable operators similarly state that they should not be required to block more channel capacity than necessary, i.e., the rest of the blocked channel should not be "warehoused" for indecent programming. For example, Continental Cablevision says that many cable systems cannot afford to devote two channels for leased access programming that would otherwise fit on a single leased access channel. It further states that cable operators should be allowed to aggregate and scramble all indecent leased access programming on a single channel. Time argues that, in addition to being allowed to block only during indecent programming, cable

operators should be able to limit periods for indecent programming and to choose time slots, and that programmers should not be permitted to change their minds during the contract period requiring channel placement changes. Cox Cable argues that cable operators should not be required, as part of the blocking obligations, to market blocked programming.

64. As for subscriber access, TCI says that the FCC should allow the cable operator to use any reasonable method to notify subscribers about the blocked channel. NCTA believes that subscribers should have sufficient time to request access to that channel in writing and that cable operators should have additional time to unblock that channel for interested subscribers. It therefore states that cable operators should have sixty days to notify subscribers (as well as to establish the channel) from an initial request for airing indecent leased access programming and, thereafter, a minimum of thirty days' notice to satisfy requests for blocking of service. Alliance maintains that subscribers should be able to request unblocking of a blocked channel by telephone after the subscriber has mailed the cable operator a written request and that the Commission should prescribe the form of the request and ensure that the cable operator protects the subscriber's privacy.

Discussion

65. We shall allow cable operators to employ any blocking mechanism that they choose — scrambling, interdiction or any other method, as long as it is effective.[46] We agree that cable operators

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[46] We have already addressed in paras. 12-17, *supra*, the mandatory "blocking" approach versus section 624's voluntary "lockbox", approach. Nevertheless, we think it would be permissible to place all indecent leased access programming on a single channel and use lockboxes as a blocking mechanism, so long as the blocking is accomplished in a non-voluntary manner such that access to the channel is precluded unless and until subscribers request access in writing. We believe this approach would satisfy the plain language of the statute (requiring subscribers to gain access by making requests in writing) and the statute's clear intent that cable operators, not subscribers, be responsible for initial blocking.

should not be required to block a leased access channel to be used for carriage of indecent leased access programming until they receive a request for carriage from a provider of indecent programming.[47] Similarly, cable operators should be allowed to use the channel for other non-blocked leased access programming to the extent it is not being used for indecent programming.[48] Thus, we will require that the channel be blocked only during those time periods that indecent leased access programming is being shown.

66. We disagree with those commenters who suggest that cable operators should be permitted, on blocked channels, the additional flexibility to "channel" such programming by scheduling it only at late hours of the evening or other times when children are least likely to be viewing. As we stated in the *Notice*, "[i]nstead of this type of 'safe harbor' approach" that has been applied to broadcasting, Congress appears to have "deliberately chosen" a 'blocking' approach, similar to that under section 223 for indecent telephonic communications.[49] We do agree with Time that cable operators should be permitted, if they so choose, to provide an additional blocked leased access channel for indecent programming if the first channel becomes full.[50]

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[47] As discussed below, however, operators must have the capability to block such a channel within the implementation time frame specified in our rules.

[48] As suggested by one commenter, the "blocked" channel shall be counted as part of the cable operator's obligation to provide leased access capacity under section 612, as amended by the new Cable Act.

[49] However, as previously indicated, *supra* note 39, we believe that cable operators with written and published policies issued pursuant to section 10(a) have authority under that section to block indecent programming and to schedule it as they please on blocked channels.

[50] We decline to address at this time whether operators that do not have a written and published policy under section 10(a) might be required to provide an additional blocked channel in the event a single channel is

(continued...)

67. We decline to specify the form of notification about the availability of a blocked channel that cable operators should give to subscribers but we shall require that the subscriber's written request to receive the channel contain a statement that the subscriber is at least eighteen years of age. Cable operators will be required to "unblock" the channel within thirty days after receipt of a written subscriber request. Because it appears contrary to statutory intent, we decline to adopt Alliance's suggestion that "unblocking" should be permitted by telephone call if the subscriber has notified the cable operator in writing to activate his or her ability to have the block lifted. We believe that mere telephonic confirmation is insufficient to ascertain that the recipient is, in fact, at least eighteen years of age.

2. Time Period for Implementation

68. We did not specify or recommend in the *Notice* a specific time frame by which cable operators would be required to implement the blocking and associated requirements of section 10(b). Most cable operators argue that a time frame of 180 days following adoption of final FCC rules should be set to allow cable operators sufficient lead time to equip themselves and their customers in order to comply with the new requirements. Additionally, Time advocates that non-addressable cable systems be allowed ten years if they use lockboxes. Cox Cable urges cable operator compliance within 180 days following receipt of a first notification of request for carriage of indecent leased access programming. TCI states that cable operators should be afforded a reasonable time to comply but does not specify a particular time frame. Alliance argues that cable operators will need at least 120 days before they can implement the Commission's final rule but that the Commission should clarify that, during the interim period, the provisions of section 10 are to be stayed. MPAA states that an

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[50](...continued)

filled. If and when that circumstance arises, we can examine that question in a concrete factual setting.

acceptable time frame for implementation would be 120-180 days from the date the final rules become effective.

Discussion

69. We are aware that implementation of the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems and that the new requirement may require considerable adjustments by some cable systems in terms of rearranging existing services to accommodate a single leased access channel of indecent programming. In addition, the new regulations will require cable operators to establish and administer new procedures for subscriber notification of the availability of this new channel and for the processing of requests of leased access users and of subscriber requests for this channel, etc. We are also aware of the efforts that may be involved for those systems that require trapping devices to circumscribe access to these services.

70. In view of the foregoing considerations, we will require that cable operators have in place blocking implementation mechanisms and procedures within 120 days of the date of publication of the new regulations in the *Federal Register* so that thereafter they will not carry programming identified as indecent on non-blocked channels and will be able to accommodate any request for carriage of indecent programming on a blocked leased access channel within 0 days after its receipt. The 120 day period should provide cable operators sufficient time within which to make technical arrangements, inform subscribers of the new leased access blocking requirement and afford subscribers adequate time to notify the cable operator in writing if they wish to receive any programming on the channel when, and if, it becomes available on the system.[51]

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[51] As we noted earlier, subscribers should notify the cable operator in writing at least 30 days prior to the date they wish to receive the service and the notification should include a statement that the subscriber is at least eighteen years of age.

71. This, or similar measures taken during the transition period,[52] should also enable cable operators to approximate the number of subscribers initially interested in receiving the channel, which should assist in technical implementation of the blocked channel. At the expiration of the 120 day period, cable operators subject to section 10(b) will be required to place indecent programming on a blocked channel. This means that, no later than 30 days prior to the expiration of the 120 day period, programmers must identify any programming that is indecent and which is intended to be carried on the 121st day of the time period.

72. We believe that these time frames are reasonable and are generally consonant with the time frame requested by most of the parties in their comments. We note that cable operators have been on notice of the statute's requirement since the date of enactment of the new Cable Act, October 5, 1992. We further note that many cable systems have existing technology in place in various degrees for use in providing other services that can be adapted toward fulfilling these requirements. Thus, even though the implementation period may not be as long as many cable operators would prefer, we believe it is sufficient.

VI. Resolution of Disputes under Sections 10(b)

73. There was a broad range of comment over the forum and the manner in which disputes relating to indecent programming on

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[52] Unless cable operators have a written and established policy of prohibiting indecent leased access programs adopted under section 10(a) of the new Cable Act, they will not be permitted to prohibit indecent programming on the leased access channels during the transition period to the blocking approach. We decline to stay the provisions of section 10(a), as requested by Alliance, because we are not empowered to stay statutory provisions and, moreover, both section 10(a) and section 10(d) are self-executing provisions that became effective 60 days after enactment of the new Cable Act on October 5, 1992. We also shall not stay the effectiveness of the new rules adopted under section 10(b) pending court review, as requested by Alliance.

leased access channels should be handled. Some comments specifically addressed procedures for the leased access channels while other comments, particularly from access groups, were directed solely at the public, educational, and leased access channels on cable systems.[53] Time suggested that such disputes should be resolved locally, preferably in court, while others, such as Cox Cable, contend that the Commission is the proper forum for resolution of disputes. NCTA and others suggest that the Commission should adopt expedited resolution procedures consonant with the new provision in amended section 612(c)(4)(iii) that requires establishment of "procedures for the expedited resolution of disputes concerning rates or carriage under this section." Intermedia argues that the Commission should exercise exclusive jurisdiction, particularly over prior restraint issues and disputes.

74. Denver Access maintains that disputes should be appealable to the Commission or another neutral adjudicator. NATOA maintains that disputes should be resolved by the courts because ultimately, they must decide the constitutional issues. Alliance maintains that without procedural safeguards applicable to prior restraints on speech, the statute and implementing regulations cannot withstand constitutional scrutiny.

Discussion

75. We do not envision disputes arising from the content of programs on the leased access channel except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent. In view of the fact that Congress explicitly required us to adopt regulations implementing section 10(b), we believe that, in such instances, we are obligated to specify procedures for resolution of disputes relating to section 10(b)'s implementation. Therefore, where such

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[53] As noted previously, that part of this rule making addressing restrictions on the public, educational, and leased access channel will be addressed at a later date in a separate *Report and Order*. Accordingly, those comments will be considered therein.

disputes arise (*e.g.*, there is an allegation that a program provider failed to comply with the new program identification rules), we will entertain special relief petitions under section 76.7 of our rules, 47 C.F.R. § 76.7, from cable operators in accordance with the existing procedures we have established.[54] Similarly, we will entertain complaints from subscribers in accordance with our existing complaint procedures. If the petition or complaint is meritorious, we will then take appropriate action, based upon the circumstances, *e.g.*, issue a warning or a notice of apparent liability for violation of the statute and/or Commission rules, or denial of leased access to a program provider in the future.[55]

VII. Final Regulatory Analysis Statement

76. *The Need and Purpose of this Action.* The regulations in this *First Report and Order* are intended to implement that part of Section 10 of the Cable Consumer Protection and Competition Act of 1992 that directs the Commission to adopt regulations designed to limit children's access to indecent programming on commercial leased access channels. The regulations accomplish this by requiring cable operators (which do not voluntarily prohibit indecent programming) to place indecent programming, as identified by program providers, on a "blocked" leased access channel and

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[54] Congress, in section 9 of the new Cable Act, requires us to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section." We believe that Congress intended by this provision to insure that the rights of leased access users to carriage or reasonable rates under section 612 of the Communications Act would not be unduly prejudiced pending resolution of a dispute under section 10(b) of the new Cable Act, we will apply these expedited procedures.

[55] To the extent other disputes arise between the cable operator and program provider, they can also be handled, as appropriate, under the special relief provisions of section 76.7 of our rules. 47 C.F.R. § 76.7, particularly where they involve other provisions of amended section 612 of the Act relating to rates, terms and conditions of leased access use.

restricting subscriber access to this channel unless specifically requested in writing by a subscriber.

77. *Summary of Issues Raised By the Public Comments in Response to the Initial Regulatory Flexibility Analysis.* Boston Community Access commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on access administrators, access users, and others, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

78. *Significant Alternatives Considered and Rejected.* In this First Report and Order, we have considered the most efficacious manner to implement the section 10's provisions relating to indecent programming on leased access channels and in the least burdensome manner that is consistent with the statute's aims. To the extent that Boston Community Access' comments, noted above, are directed to adoption of restrictions relating to the public, educational, and governmental access channels, they will be addressed in a subsequent *Report and Order*. To the extent they are intended to address leased access channel restrictions, we have attempted to minimize the burdens on leased access program providers by not requiring notification as to each individual program provided by them and by requiring such notifications only by those responsible for the content of the programming. No other significant alternatives consistent with the aims of the statute were presented.

VIII. Conclusion

79. Our purpose has been to implement the provisions of section 10(b) which, in accordance with the will of Congress, are intended to safeguard the well-being of children in our society, a compelling governmental interest, by reducing their exposure to indecent programming on commercial leased access channels. By the same token, we have sought to protect the constitutionally protected rights of others to distribute, and receive access to, such

programming on cable television. We believe that the regulations we have adopted strike an appropriate balance between these aims.

IX. Ordering Clauses

80. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub.L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 120 days from the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

APPENDIX A

AMENDATORY TEXT

PART 76 – CABLE TELEVISION SERVICE [AMENDED]

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Sec. 612, as amended, §§ 106 Stat. §§ 1460, 47 U.S.C. §§ 532

2. Part 76 is amended by adding the following subpart:

Subpart L — Cable Television Access

§ 76.701 Leased Access Channels

(a) Notwithstanding 47 U.S.C. § 532(b)(2) (Communications Act of 1934, as amended, Section 612), a cable operator, in accordance with 47 U.S.C. § 532(h) (Cable Consumer Protection and Competition Act of 1992, § 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c).

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber's access to such programming within 30 days from receipt of a subscriber's request.

(d) A program provider requesting access on a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g). Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be provided up to 30 days prior to the requested date for carriage. A program provider requesting carriage of "live programming" on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) if it fails

to block indecent programming that is not identified by a program provider as required in paragraph (d).

(e) A cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming subject to the requirement of paragraph (b). A cable operator may request a program provider of "live programming" to certify that reasonable efforts will be made to ensure that such programming is not obscene programming or indecent programming subject to the requirement of paragraph (b).

(f) A cable operator shall not be required to provide leased access to a program provider if —

(1) the program provider refuses to identify whether programming is indecent as required under paragraph (d); or

(2) the program provider refuses or fails to certify, if requested by the cable operator under paragraph (e), that the programming is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(3) the program provider refuses or fails to certify, if requested by the cable operator under paragraph (e), that reasonable efforts will be made to ensure that any "live programming" is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(4) the program provider has failed to provide up to thirty days prior notice, if requested by the cable operator, that the programming is indecent.

(g) For purposes of paragraphs (b)-(f), "indecent programming" is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(h) Cable operators shall retain records sufficient to verify their compliance with paragraph (b) of this section and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C. § 503(b)(6)(B).

3. Section 76.305(a) is amended by deleting the word "and" before "§ 76.225(c)" and deleting the period at the end of that paragraph and inserting "and § 76.701(h) (records for leased access)."

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications")

Bogue, Virginia B. and Amy Lorum*

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")

National Cable Television Association, Inc. ("NCTA")

Nationwide Communications Inc. ("Nationwide Communications")

Neuman-Scott, Mark*

Nutmeg Public Access Television, Inc.

Rhoda, Carolyn*

Seffren, David A.*

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Visser, Randy, Director SPTV

Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision,

Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")

Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")

Austin Community Television, Inc.

Baus, Janet

Cambridge Community Television

Channon, David

Cincinnati Community Video, Inc.

City of Austin, Texas

City of St. Paul

Columbus Community Cable Access, Inc.

Community Antenna Television Association, Inc.

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Friendly, Joe

Malden Access Television*

Mollberg, Erik S.

Motion Picture Association of America, Inc. ("MPAA")

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties ("NATOA")

National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation & 70*

Staten Island Community Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

*Informal comment or informal reply comment

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-258

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

SECOND REPORT AND ORDER

Adopted: March 25, 1993; **Released: April 2, 1993**

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. § 1460. Section 10(c) of the new Act expressly provides:

> Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

2. On November 5, 1992, we adopted a *Notice of Proposed Rule Making*, 7 FCC Rcd 7709 (1992), seeking comment on proposals to implement section 10, including subsection (c) noted above. On February 1, 1993, we adopted a *First Report and Order ("First Report")*, 8 FCC Rcd 998 (1993), to implement section 10(b) of the new Act, which requires cable operators to block indecent programming on commercial leased access channels of cable systems unless subscribers specifically request access to such programming in writing. In the *First Report*, we stated that rules to implement section 10(c) of the Act, would be adopted at a subsequent date. This *Second Report and Order*, adopted today, constitutes our implementation of section 10(c) of the Act, as required under the 1992 Cable Act.

3. We received comments in this proceeding from cable operators, cable access organizations, governmental authorities, and others who might be directly or indirectly affected by cable operator-imposed restrictions on public, educational, and governmental ("PEG") access channels.[1] In the paragraphs that follow, we discuss the major issues raised by the commenters as they relate to section 10(c) and its implementation and the conclusions we reach on these matters.[2]

II. RELEVANT STATUTORY PROVISIONS

4. To provide an overall understanding of the issues involved in this proceeding, we shall first outline the relevant statutory

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[1] A list of the commenters in this proceeding is provided in Appendix B.

[2] Just as we stated in the *First Report* regarding commercial leased access, the question of which persons or entities should be required to bear the costs and expenses that arise when cable operators choose to prohibit materials under section 10 is more appropriately addressed in the cable rate regulation proceeding. *See Notice of Proposed Rulemaking in MM Docket No. 92-266*, FCC 92-544 (adopted December 10, 1992; released December 24, 1992).

provisions in the existing Communications Act of 1934, as amended, and the new Cable Act. First, section 611 of the Act, 47 U.S.C. § 531, provides that franchising authorities "may establish requirements . . . with respect to the designation of channel capacity for public, educational, or governmental use . . ." 47 U.S.C. § 531(a). Thus, unlike the commercial leased access channel requirements of section 612 of the Communications Act, 47 U.S.C. § 532, cable operators are not required by the Communications Act to provide public, educational or governmental access channels. Rather, the Act allows, but does not require, franchising authorities to impose PEG obligations. In addition, sections 611(b) and 611(c), 47 U.S.C. § 531(b) and (c), state that a franchising authority "may require rules and procedures for the use of the channel capacity designated pursuant to this section" and "may enforce any requirement in any franchise regarding the providing or use" of such channel capacity.

5. Section 611(e), 47 U.S.C. § 531(e), expressly prohibits cable operators from exercising "any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section." That provision is subject to section 624(d), 47 U.S.C. § 544(d), which allows a franchising authority and a cable operator to specify, in a franchise or renewal thereof, that certain services shall not be provided or shall be provided subject to conditions, if such services are "obscene or otherwise unprotected by the Constitution of the United States." Section 611(i) is now further subject to section 10(c) of the 1992 Cable Act, which, as noted above, permits cable operators to exercise editorial control over PEG channels for the limited purposes of prohibiting "programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, as noted in the *First Report and Order*, section 10(d) of the new Cable Act amended section 638 of the Communications Act, 47 U.S.C. § 548, by removing cable operators' immunity for programs that involve obscene materials on

any of the access channels (leased and PEG alike).[3] Having outlined the relevant statutory provisions, we shall now turn to the issues at hand.

III. CONSTITUTIONALITY OF SECTION 10(C)

6. As noted in the *First Report*, many commenters, including cable operators, access organizations and access users, challenged the constitutionality of section 10 of the new Cable Act, although, in some instances, for completely different reasons. Many of the arguments addressed therein were not limited to sections 10(a) and 10(b) of the new Cable Act relating to commercial leased access but were also directed to section 10(c) as it applies to the PEG channels. On the other hand, some cable interests, for example NCTA, maintain that to the extent section 10 affords cable operators the discretion to prohibit such materials on the PEG channels, it simply restores some of their first amendment rights on such channels.[4]

Discussion

7. In the *First Report*, we rejected a constitutional challenge that section 10(a), which permits cable operators to prohibit indecent programming through a written and published policy, constitutes "state action" and is therefore unconstitutional because it allows cable operators to serve as "surrogates" for the government and prohibit indecent programming completely on commercial leased access. Instead, we held that a voluntary policy prohibiting such programming does not constitute state action and, therefore, because section 10(a) does not mandate such cable

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[3] This particular provision is self-effectuating and therefore became effective December 4, 1992.

[4] As we stated in the *First Report*, our actions in this proceeding are limited to section 10's provisions and their implementation and, for this reason, we shall not address the constitutionality of other parts of the new Cable Act or existing Communications Act that are not directly at issue here or properly within the scope of our *Notice of Proposed Rule Making*.

operator policies, the section does not violate the prohibition on government regulation of speech under the first amendment.[5]

8. With respect to the similar claim that a cable operator's discretion exercised pursuant to section 10(c) is "state action," cable operators are not compelled under that provision to serve as "government surrogates" in prohibiting programming. Cable operators are merely given the freedom to prohibit certain types of program materials if they so choose, just as they are permitted to prohibit indecent programming under section 10(a). Nothing in the language or legislative history of this subsection suggests that Congress meant the additional latitude accorded to cable operators was intended to be mandatory.[6] Thus, we do not believe that

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[5] Similarly, we declined to hold that access channels are public forums and thus subject to the state action doctrine. We stated that none of the cases cited by Alliance had held that cable access channels were public forums. We pointed out that, by analogy, commercial leased access is similar in purpose and function to common carriage and that courts had refused to find that the activities of common carriers constitute state action for constitutional purposes. We believe that this same reasoning extends to public access channels on cable systems. Moreover, to the extent that educational and governmental access channels are to be used only by specified local entities, not the public at large, these channels would appear even less akin to public forum facilities.

[6] For this reason, this provision cannot be said to be "underinclusive," as alleged by Alliance and New York Committee for a Responsible Media because it singles out particular materials on the PEG channels but not on the non-access channels. Cable operators now have the same freedom to prohibit these materials on the PEG channels that they have on the non-access channels. In any event, Congress is free to determine that, in view of the unique attributes of these types of channels and the problems that they pose, cable operators should have this editorial discretion. As Alliance itself points out, "[e]ach method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981), quoting *Kovacs v. Cooper*, 335 U.S. 77, 97 (1949).

Congress' decision to allow cable operators editorial discretion as provided by the statute constitutes state action.

9. In addition, state action does not exist merely because cable operators are no longer immune from liability for obscene programming on access channels. In this regard, commenters argue that the "voluntary" aspect of the provision is removed, and hence is illusory, when coupled with section 10(d)'s removal of cable operator's immunity for obscene programming on access channels. However, by analogy, the fact that a common carrier may not be immune from liability for transmission of obscene materials if it has actual knowledge of the use of its facilities for this purpose in no way renders the activities of a common carrier state action when it prohibits the unlawful transmission of obscene material. Just as federal or state law can require that common carrier facilities be used only for lawful purposes, so too can such laws require that cable access facilities be used only for lawful purposes. Thus, as we explained in the *First Report*, para. 22 n. 22, as with common carriers, a cable operator's decision to ban obscene programming does not constitute state action or even an unlawful restraint merely because the cable operator is subject to potential liability for carriage of obscene programming.

IV. IMPLEMENTATION OF SECTION 10(C)

A. Definition of Statutory Terms

10. The prohibitions which cable operators may impose under Section 10(c) cover "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[7] Neither the statute nor the

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[7] In this regard, we note that, to the extent section 10(c) covers materials also covered by section 624(d), section 10(c) permits unilateral action by cable operators, whereas section 624(d) contemplates action pursuant to agreement between cable operators and franchise authorities. In light of that, we disagree with commenters, such as the City of St.

(continued...)

legislative history provide a definition of these terms. In the *Notice*, however, we stated that the Senate drafters apparently intended the term programming involving "sexually explicit" conduct to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels. *See* para. 13 n.11, citing 138 CONG. REC. § 646 (daily ed. Jan. 30, 1992). Similarly, we suggested that the provision relating to "material soliciting or promoting unlawful conduct" may have been intended by Senate drafters to address programming that solicits prostitution. *Id.*

11. Alliance maintains that the particular restrictions relating to sexually explicit conduct and promoting unlawful conduct are overbroad. It, as well as Acton, states that the term "sexually explicit conduct" omits reference to patently offensive or to community standards. Boston Community Access maintains that this term is overbroad and that the FCC's interpretation is flawed. It argues that the term should be given the same meaning as

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[7](...continued)

Paul, who contend that Congress did not intend section 10(c) to preempt any existing agreements entered into pursuant to section 624(d). The City of St. Paul argues that such prior agreements concerning the manner in which cable operators may exercise control over PEG channels should be viewed as "waiving" cable operator's section 10(c) rights. In view of section 10(c)'s permissive nature, such waivers, it is argued, do not conflict with, and therefore are not preempted by, section 10(c). As a general matter, however, we believe that agreements entered into prior to the effective date of rules implementing section 10(c) would not be viewed as "waiving" future section 10(c) rights unless such a waiver is express. Accordingly, unless the cable operator agrees, or a court determines, that future rights under section 10(c) have been waived through a pre-existing franchise agreement, we believe that Congress intended the new rights accorded by section 10(c) to supersede prior agreements under section 624(d). Further, we do not believe such an interpretation is unfair to franchise authorities. A franchising authority's ability to impose PEG access requirement and to restrict a cable operator's control over such channels stems from provisions of the Cable Act, and Congress is free to create exceptions to those statutory provisions.

"obscene." On the other hand, Cox Cable, Intermedia, New York State and others argue that the term should be construed as "indecent" and that the Commission should use the term "indecent" in the rules to avoid confusion and to clarify its meaning. According to Bogue and Lerom, the term should include frontal nudity, nude dancing, sado-masochistic behavior, excretory activities, exposed genitals and fondling.[8]

12. Acton maintains that the term "soliciting or promoting unlawful conduct" is not susceptible to the meaning suggested by the Commission in the *Notice* since it is not limited to prostitution but includes a vast array of criminal activities such as drug use and illegal gambling. The City of San Antonio states that the rul should clarify and specifically allow these terms to be defined by cable operators and also clarify whether unlawful conduct such as copyright infringement, presenting slanderous materials or violation of other similar laws can themselves be prohibited by cable operators in its policies. New York State says that Commission efforts to clarify this category should recognize that PEG channels are limited to noncommercial use. Alliance maintains that, under *Hess v. Indiana*, 414 U.S. 105, 108 (1973) and other cases, the U.S. Constitution forbids or proscribes restrictions on speech relating to advocacy of law violations. Santa Barbara echoes this view in stating that this provision would permit cable operators to ban advocacy of civil disobedience or material that might challenge existing laws. Manhattan Neighborhood Network suggests that restriction of the types of materials described in the statute is disturbingly vague and, therefore, urges that the rules should be specific and as narrowly defined as possible.

Discussion

Obscenity

13. At the outset, we conclude that cable operators, in order to exercise the limited degree of discretion allowable under section

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[8] They also assert that interpretations of this term should be made by local cable advisory committees. *See* discussion in para. 31, *infra*, regarding resolution of disputes.

10(c), must be apprised of the specific categories of programming they may prohibit and of the meaning that should be ascribed to these categories. Although the legislative history provides some guidance, it does not remove all ambiguity as to the meaning of these terms. With respect to programming "containing obscene materials," we believe that the scope of the this provision should be coextensive with materials that meet the test set forth in *Miller v. California*, 413 U.S. 15 (1973).[9] Thus, cable operators should be guided by the *Miller* obscenity standard in their determinations of what materials fit into the first category.

Sexually Explicit Conduct

14. The second category refers to programming containing "sexually explicit conduct." As noted above, neither the statute nor legislative history provides a definition of this phrase. Although we are urged by some commenters to construe these words to mean "obscene," we believe, as explained below, that a more reasonable construction of the statute would be to interpret these words as meaning "indecent." It is clear from the very words of the statute itself, and from the legislative history, that Congress did not intend the three categories of materials to be construed as either synonymous or interchangeable with each other. Congress clearly meant the third category, promoting or soliciting unlawful conduct, to be something different from the first category, obscene materials. Moreover, there is nothing to suggest that Congress intended the first and second categories to be construed the same; otherwise, Congress' inclusion of "sexually explicit conduct" would be mere surplusage and, hence, unnecessary. Thus, it is our belief that

[9] Although similar to the indecency standard, the test under *Miller* also requires findings (1) that the work appeals to the prurient interest and (2) that the work, if taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

Congress intended each of these categories to be separate and distinct as to their meaning and application.[10]

15. Having concluded that Congress meant to ascribe different meanings to each of the terms used, we must discern from congressional intent the meaning that should be ascribed to the second category in section 10(c). As some of the parties point out, some programming may contain "sexually explicit conduct" that is not necessarily "indecent" as we define that term under section 10(b) and as described under section 10(a). Nevertheless, we believe that a construction of "sexually explicit conduct" to mean indecent programming is reasonable, given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to "indecent" programming on cable access channels. This fact suggests to us that Congress did not intend to accord this term a meaning different from that of "indecent." In addition, by this interpretation, we think that cable operators and others will be able to discern the meaning of the term more clearly and precisely. In this regard, the courts have previously upheld the Commission's generic definition of "indecent" as sufficiently defined to provide guidance to a person of ordinary intelligence. *See Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-41 (2d Cir.1991). Accordingly, we believe that the same standard applicable under section 10(a) and, as defined by us for purposes of section 10(b), should also govern cable operators' determinations under section 10(c).

Soliciting or Promoting Unlawful Conduct

16. As to the scope of the term "soliciting or promoting unlawful conduct," we believe that the intent underlying the statute is to make clear that if the dissemination of information or material would constitute unlawful solicitation of a crime or would otherwise be illegal under federal, state, or local law, it would also be subject to proscription by cable operators on the PEG access channels.

[10] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978) (words "obscene, indecent, or profane" in 18 U.S.C. § 1464, written in disjunctive, meant to have separate meanings).

17. For example, consistent with the legislative history noted above, it would cover solicitation of prostitution where such solicitation is unlawful and therefore a crime. Similarly, it would appear to cover the presentation of materials that are unlawful because they are likely to incite an immediate breach of peace or otherwise incite imminent unlawful action. *See, e.g., Wilson v. Attaway*, 757 F.2d 1227 (11th Cir.1985), *rehearing denied*, 764 F.2d 1411. It would also appear to include the making of a threat of bodily harm against a government informant since such threats are subject to punishment under federal law, 18 U.S.C.A. § 1513, and have been held not to involve "threats" relating to ideas or advocacy. *See U.S. v. Velasquez*. 772 F.2d 1348 (7th Cir.1985), *cert. denied*, 475 U.S. 1021 (1986). Similarly, the dissemination by any member of the military of secret military intelligence would appear to fit into this category because such dissemination is prohibited to "one not entitled to it" under 18 U.S.C.A. § 793. *See United States v. Morison*, 844 F.2d 1057 (4th Cir.1988), *cert. denied*, 109 S.Ct. 259 (1988). In these and analogous circumstances, the cable operator would be free to prohibit these materials on the basis that the disseminations are unlawful. Conversely, this part of the statute would not cover speech that is otherwise protected, *e.g.*, speech advocating civil disobedience that is not directed at inciting or producing imminent lawless action. We believe this interpretation is reasonable and consistent with the intent and purpose underlying this particular provision. For example, we note by analogy that communications common carriers are permitted to prohibit use of their facilities for unlawful purposes.[11]

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[11] *See Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2819 (1987).

B. Cable Operator Discretion under Section 10(c)

18. Continental Cablevision states that section 10(c) should be interpreted to permit cable operators to prohibit some, but not necessarily all, of the types of programs specified in section 10(c). Acton states that since the PEG channel provision is voluntary, operators should have substantial flexibility, including the option to pursue a safe harbor approach for "mature" programming. If a cable operator has the statutory right to ban such programming, Acton asserts, it must have the lesser right to channel it. The City of San Antonio agrees insofar as it advocates rules that allow discretion to schedule programs so that more adult-oriented programming is reserved for later hours. Bogue and Lerom, however, state that the Commission should require that any indecent or sexually explicit programming may be shown only after midnight and before 6 a.m.

Discussion

19. We believe that section 10(c) was intended to afford cable operators broad discretion in deciding how to treat PEG programming covered by section 10(c). Thus, for example, we believe that a cable operator could decide under section 10(c) to prohibit only obscene programming from the PEG access channels but not other types of programming described in that subsection. Similarly, we believe that this discretion also allows cable operators to require indecent programming to be shown in the late evening hours, rather than prohibiting such programming entirely. A cable operator could also decide to prohibit such programming on the public access channel but not exercise such control over the other access channels designated by local authorities for educational or governmental use.

20. Further, we believe that a "reasonableness" standard should be read into section 10(c). This will permit cable operators to prohibit programming which they "reasonably believe" falls within the section 10(c) categories. Such an interpretation will ensure that cable operators act in good faith in making such determinations and will further ensure that, where local authorities have authorized PEG channels, materials falling outside the

proscribed categories are not unreasonably barred from presentation.

C. Certification as Method of Enforcement of Prohibitions

21. In the *Notice*, we requested comment on whether it would be appropriate for cable operators to implement their section 10(c) policies by requiring certifications from users that no materials fitting into any of the statutory categories would be presented on these channels.

22. Cable interests were very supportive of a certification approach under section 10(c). Blade Communications favors allowing cable operators to require certification as to whether programming on the PEG channels is obscene and limiting liability for those who comply with regulatory steps for obtaining programmer certification. Similarly, CATA suggests that cable operators should be allowed to require and rely upon certifications from programmers and that the burden to identify such programming should be on programmers. NCTA and other cable interests also believe that cable operators should be able to rely on certifications and should be immunized from liability when doing so. In addition, Nationwide urges that cable operators be allowed to obtain certifications from the party providing programming directly to the cable operator. TCI, also urging a certification approach, says that the Commission should state that cable operators are not liable for non-obscene programming on the access channels.

23. Franchising authorities also were generally receptive toward this approach. For example, the City of Austin states that a certification requirement would be an appropriate mechanism, although it urges the Commission to impose this requirement on the individuals responsible for programming content and to allow public access managers to administer it. Along similar lines, NATOA states that primary responsibility should be on programmers to identify obscene material and to certify that their programming does not contain obscene or indecent material. In addition, NATOA recommends, as others do, that programmers be permitted to certify

on a blanket, as opposed to a program-by-program, basis. The City of Austin, however, advocates that the Commission craft its rules to allow cable operators very little discretion under any program certification process.[12] The City of San Antonio recommends that the new rules place the burden of certification on the producer.

24. Access organizations and access users were either opposed to, or less than enthusiastic about, use of a certification process. For example, Boston Community Access believes that requiring certification for each program would impose a huge new burden of staff work and paperwork on organizations such as itself, especially since there are very few access programs that actually contain material prohibited by the proposed rule. Similarly, Randy Visser maintains that requiring certifications for users of local public access channels is unrealistic and could not be enforced through the local cable regulatory structure. Alliance maintains that there is simply no need for the Commission to require that programmers certify the content of their programs because, in its opinion, operator liability should not be implicated. Other access groups, for example Ann Arbor, state generally that the rules should be specific and narrow so as not to hamper use of access channels by those seeking to provide live or taped programming.

Discussion

25. In the *First Report*, we stated that cable operators would not be precluded from requiring certifications from providers of leased access programming, as appropriate, under either section 10(a) (relating to a cable operator-enforced prohibition on indecent programming) or section 10(b) (relating to the blocking of indecent

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[12] The City of Austin also alleges, as did Alliance, that the Commission's *Notice of Proposed Rule Making* failed to comply with the Administrative Procedure Act ("APA") and, therefore, urges the Commission to issue a revised *Notice*. We explained in the *First Report* the reasons for our belief that the Notice provided adequate notice of our proposals and opportunity to comment consistent with APA requirements. Our rationale and analysis equally pertains to this part of the rulemaking process and, therefore, the City of Austin's arguments are rejected.

leased access programming). We stated that a relatively simple, straightforward certification need not be burdensome nor serve as a deterrent to access users. We believe that the same analysis and conclusions apply to the PEG channels. Accordingly, we will not deny cable operators the right to require certifications that the programming intended for presentation on a PEG channel does not contain material that the cable operator has proscribed under section 10(c). Moreover, as we stated in the *First Report*, in view of the removal of cable operators' immunity for obscene programming on access channels, permitting a certification requirement is a reasonable approach for this agency to adopt.[13]

26. As suggested by several commenters, we thus believe that it would be permissible for cable operators to require blanket certifications from access users or from an access manager or administrator where the access manager or administrator agrees to assume the certification obligation.[14] This should minimize burdens both for access users and access administrators and managers. Indeed, from the comments received, it appears that a number of access organizations already have in place procedures that require certification statements, or their equivalent, from access programmers.[15] In addition, as suggested by a number of commenters, we believe that cable operators should be permitted to require certifications that reasonable efforts will be used to ensure

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[13] Similarly, as permitted in the *First Report* relating to leased access, we will not deny cable operators the right to request indemnification from access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program that is certified as "not obscene" by an access programmer.

[14] Access administrators, even if they decide not to certify themselves, could be required by cable operators to undertake the ministerial task of obtaining certifications from users.

[15] *See, e.g.*, Statement of Hudson Community Access Television.

that no live programming contains material prohibited by a cable operator under section 10(c).[16]

V. RESOLUTION OF DISPUTES

27. In the *Notice*, we asked commenters "to address whether specific procedures should be developed to govern disputes between the cable operator and programmer of these access channels." Because "these channels are mandated and their conditions of use are defined at the local level," we proposed that "any such disputes should be handled at the local level."

28. Cable operators differ on the question of the appropriate forum for resolution of section 10(c) disputes. For example, Acton argues that individual disputes should be resolved locally, preferably in court, although it would not be opposed to local franchising authorities that assume original jurisdiction over such matters. On the other hand, Intermedia would prefer that disputes over PEG channels and section 10(c) be adjudicated by the Commission.

29. Access organizations and interests argue that procedural safeguards should apply to disputes that arise over the content of material airing on the PEG access channels to ensure that cable operators do not impermissibly prohibit or otherwise restrain the showing of access programming on these channels.[17] Baratta, however, states that all questions of content should be dealt with on the local level.

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[16] In the *First Report*, para. 51 n. 43, we addressed and rejected arguments that certification requirements impermissibly violate program providers' rights under the first amendment or otherwise. In view of that discussion, we need not address these arguments again.

[17] Some commenters argue that procedural safeguards are required under the Constitution and must be provided if cable operators are allowed to prohibit or otherwise restrain certain types of programming on PEG channels under section 10(c). We have already rejected arguments that according cable operators additional control over their cable systems constitutes impermissible state action. As stated previously, the first amendment and the procedural safeguards pertaining thereto, apply to government, not private, action.

30. Governmental authorities are virtually unanimous in the view that such matters should be handled at the nonfederal level. For example, New York State maintains that since resolution of such disputes is a nonfederal matter, such matters, i.e., disputes between cable operators and programmers of the PEG channels, should be handled at the local level. Similarly, the City of San Antonio urges that the rules should provide for dispute resolution at the local level. However, the City of Austin argues that where the franchising authority is also the programmer, disputes should be resolved by the Commission but, otherwise, disputes should be handled by the franchising authority. NATOA, on the other hand, favors resolution of disputes in the judicial system, rather than by franchising authorities, at the local level, especially where the franchising authority may be the programmer, editor, or facilitator. The City of Tampa advocates initial review of disputes by the cable operator, followed by referral of unresolved disputes to a citizen advisory committee with appropriate authority, review by the franchising authority and, finally, judicial process.

Discussion

31. We believe that, to the extent possible, disputes under section 10(c) should be resolved in accordance with the rules and procedures established by the franchising authority for the operation of these channels. As pointed out earlier, section 611 expressly allows franchising authorities to specify rules and procedures for the PEG access channels and to enforce them. To the extent that a franchise agreement does not provide for resolution of PEG channel disputes, we assume that recourse could be obtained through the local judicial process given the local nature and character of these channels. Indeed, this might be especially appropriate where the dispute is between the franchising authority itself as a programmer or user of the PEG access channel and the cable operator. We see no need for federal intervention in such matters at this time.

VI. CLARIFICATION OF ASPECTS OF FIRST REPORT

32. In the *First Report*, we stated that copies of program provider identifications and/or certifications should be retained for

eighteen months. We wish to clarify that, as the rule appendix to the *First Report* states, the records sufficient to verify cable operator compliance with the blocking requirement should be retained "for a period sufficient to cover the limitations period specified in 47 U.S.C. § 503(b)(6)(B)," i.e., twelve months. Thus, the correct record retention period is twelve months as new rule section 76.701(h) provides. We also wish to clarify that while cable operators are required to retain requests to receive or terminate access to the blocked leased access channel for the twelve month period, they shall not make such information available to the public nor maintain such information in their public inspection files. Section 631 of the Communications Act, 47 U.S.C. § 551, expressly prohibits cable operators from disclosing "personally identifiable information" about subscribers without their consent. Accordingly, such information should not be included in cable operators' public inspection files.

VII. FINAL REGULATORY ANALYSIS STATEMENT

33. The Need and Purpose of this Action. The regulations in this *Second Report and Order* are intended to implement that part of the Cable Consumer and Competition Act that directs the Commission to adopt regulations to enable cable operators to prohibit any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct on public, educational, or governmental access channels. The regulations accomplish this by allowing cable operators to prohibit such materials.

34. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis. Boston Community commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on these entities and persons, their comments

were not specifically directed to the Initial Regulatory Flexibility Analysis.

35. *Significant Alternatives Considered and Rejected*. In this *Second Report*, we have considered the most efficacious manner of implementing section 10(c) without imposing unreasonable burdens on the various entities involved. Although a number of commenters alleged that a certification approach as suggested in the *Notice of Proposed Rule Making* would significantly increase burdens on administrators, managers, and users of the public, educational, and governmental access channels and, therefore, would not be appropriate, we have concluded that Congress gave cable operators broad discretion under section 10(c). Consistent with this approach, cable operators are permitted to require blanket, rather than program-by-program, certifications in an effort to ease burdens that might otherwise occur. Finally, the fact that a number of access organizations that administer or manage public access channels already have procedures similar to a certification process in place should further minimize the burdens under this approach.

VIII. CONCLUSION

36. Congress has directed us to adopt rules to enable cable operators to prohibit certain types of materials on the public, educational, and governmental access channels of cable systems. We believe that our action herein accomplishes this goal by balancing the respective interests of cable operators, access users and viewers in a manner designed to lessen the burdens for all interests alike.

IX. ORDERING CLAUSES

37. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub.L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as

set forth in Appendix A below, effective 30 days from the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

APPENDIX A

FINAL RULE

PART 76 — CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611-612, as amended, 106 Stat. § 1460, 47 U.S.C. § 531-532

2. Part 76 is amended by adding at the end of Subpart L — "Cable Television Access" new section 76.702 which reads as follows:

§ 76.702 Public, Educational and Governmental Access. Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, indecent material as defined in section 76.701(g), or material

soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. A cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications")

Bogue, Virginia B. and Amy Lorum* ("Bogue and Lorum")

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Ducarpe, Ron*

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")

National Cable Television Association, Inc. ("NCTA")

Nationwide Communications Inc. ("Nationwide Communications")

New York State Commission on Cable Television ("New York State")

Neuman-Scott, Mark*

Nutmeg Public Access Television, Inc.

Rhoda, Carolyn*

Seffren, David A.*

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Visser, Randy, Director SPTV

Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation,

Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")

Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")

Austin Community Television, Inc.

Baus, Janet

Cambridge Community Television

Channon, David

Cincinnati Community Video, Inc.

City of Austin, Texas

City of St. Paul

Columbus Community Cable Access, Inc.

Community Antenna Television Association, Inc.

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Friendly, Joe

Malden Access Television*

Mollberg, Erik S.

Motion Picture Association of America, Inc. ("MPAA")

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties ("NATOA")

National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation

Rancho Palos Verdes City Council*

Staten Island Community Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

* Informal comment or informal reply comment